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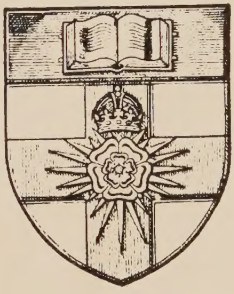

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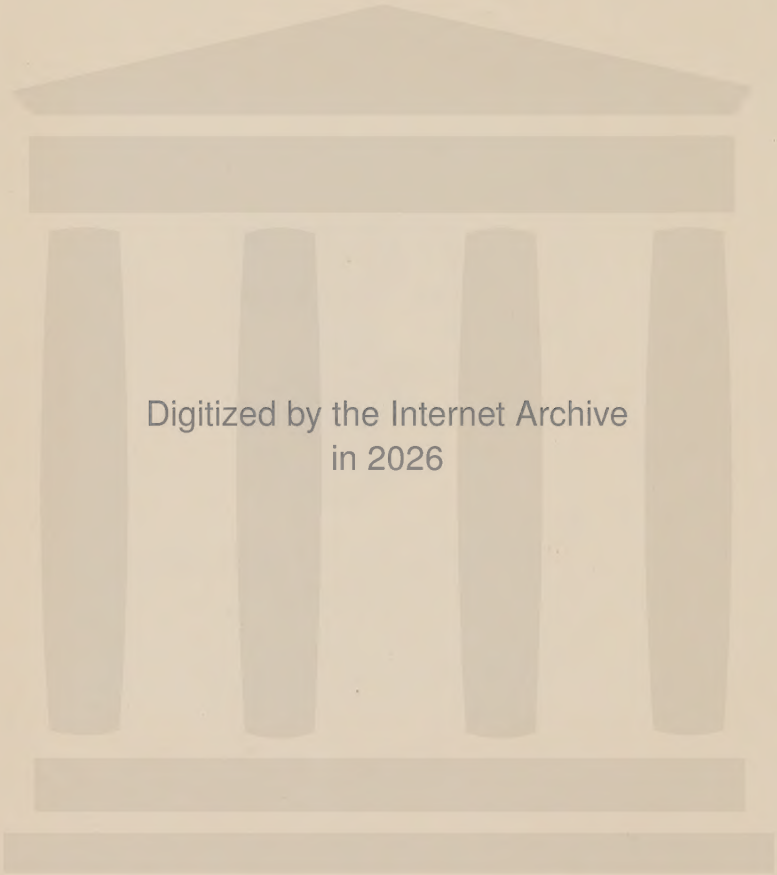
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1891.

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MEMORANDA.

1890. *In November of this year* Sir Henry Cotton, *one of the Lord Justices of Appeal, resigned his office on account of ill-health.*

Nov. 10. Sir Edward Ebenezer Kay, *one of the Judges of the Chancery Division of the High Court of Justice, was appointed a Lord Justice of Appeal in the place of* Sir Henry Cotton.

Nov. 17. Robert Romer, Esq., *Q.C., was appointed one of the Judges of the High Court of Justice in the place of* Sir E. E. Kay.

Dec. 3. The Right Honourable Sir Barnes Peacock, *one of the Members of the Judicial Committee of the Privy Council, died in Cornwall Gardens at the age of* 85.

Dec. 7. The Honourable Sir John Walter Huddleston, *a Judge of the High Court of Justice (Queen's Bench Division), died in Ennismore Gardens at the age of* 73.

Dec. 11. Robert Samuel Wright, Esq., *Barrister-at-Law, was appointed one of the Judges of the High Court of Justice in the place of* Sir J. W. Huddleston.

1891. *Jan.* 29. The Right Honourable Sir James Hannen, *President of the Probate, Divorce and Admiralty Division of the High Court of Justice, was appointed a Lord of Appeal in Ordinary, and was created a Baron for life by the title of* Baron Hannen, *of Burdock, in the County of Sussex. He was succeeded as President of the Probate, Divorce and Admiralty Division by* Sir Charles Parker Butt, *one of the Judges of the High Court of Justice.*

Francis Henry Jeune, *Q.C., was appointed one of the Judges of the High Court of Justice in the place of* Sir Charles Parker Butt.

In the April of this year The Honourable Sir James FitzJames Stephen, *a Judge of the High Court of Justice (Queen's Bench Division), resigned his office on account of ill-health.*

April 11. Richard Henn Collins, *Q.C., was appointed one of the Judges of the High Court of Justice in the place of* Sir J. F. Stephen.

ERRATA.

Page
249, *line* 17, *for* "*Garner*" *read* "*Gurner.*"
261 { *line* 7, *for* "ported" *read* "starboarded."
line 8, *for* "starboard" *read* "port."
293, *last line*, *for* "*Walton*" *read* "*Wallace.*"
408, *line* 2 from bottom, *for* "than" *read* "then."
430, in head-note, *delete* "not" *before* "been presented."
447, *line* 4, *for* "*Gurney*" *read* "*Gurner.*"
454, *line* 3, *for* "defendant" *read* "plaintiff."

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

THE OWNERS OF THE STEAMSHIP "VINDOMORA," AND THE OWNERS OF THE FREIGHT, &c. . . . . } APPELLANTS;

AND

LAMB AND OTHERS, THE OWNERS, MASTER, AND CREW OF THE STEAMSHIP "HASWELL," AND THE OWNERS OF THE CARGO, &c. . . . . } RESPONDENTS.

H. L. (E.)
1890
Dec. 5.

THE "VINDOMORA."

Ship—Collision—Fog—Alteration of Helm.

There is no hard and fast rule of practice in the Admiralty Court that where two steamships in a fog are approaching one another so as to involve risk of collision neither ship ought to alter her helm until the signals of the other give a clear indication of her direction: each case must depend on its own circumstances, and these may afford reasonable ground for believing what the direction must be.

The decision of the Court of Appeal (14 P. D. 172) affirmed.

APPEAL from an order of the Court of Appeal (1).

In an action of collision brought in the Admiralty Division by the respondents against the appellants Butt J. held that both

(1) 14 P. D. 172.

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ships were to blame and pronounced a decree accordingly. On appeal by the present respondents against so much of that decree as pronounced the *Haswell* to blame, the Court of Appeal (Lord Esher M.R., Cotton and Lindley L.JJ.) reversed the decree and pronounced the collision to have been occasioned solely by the fault or default of the master and crew of the *Vindomora* (1). The facts of the case and the grounds on which these decisions proceeded are set forth in the judgment of Lord Herschell.

Dec. 2, 4, 5. Sir *W. Phillimore* and *J. P. Aspinall* for the appellants :—

The true view of the facts is that the *Haswell* starboarded when those navigating her first heard the whistle of the *Vindomora*, and before they knew the direction in which she was proceeding. The Court of Appeal in holding that the *Haswell* was not to blame disregarded the well-established rule of practice always observed in the Admiralty Court, that when those navigating a steamer in a fog become aware that another vessel is approaching so as to involve risk of collision, the steamer ought not only to stop, and reverse if necessary, (as required by art. 18 of the Regulations of 1884 for Preventing Collisions at Sea), but ought not to alter her helm until she knows in what direction the other vessel is proceeding. This rule has been emphatically asserted and applied in many cases; among others by Butt J. in *The Lotus* (2), and by Sir J. Hannen in *The Rheubina* (3), and again by Butt J. in *The Resolution* (4). There was nothing in the circumstances to justify a departure from the rule. If the *Haswell* had not starboarded when she first heard the whistle of the *Vindomora*, the collision would not have occurred.

Sir *R. Webster* A.G. Sir *C. Hall* Q.C. and *L. E. Pyke* for the respondents were not heard.

LORD HERSCHELL :—

My Lords, this appeal arises in an action brought by the owners of the *Haswell* against the owners of the *Vindomora*, to recover in respect of a collision between those two vessels which

(1) 14 P. D. 172.
(2) Not reported except in Shipping Gazette, 1890, p. 49.
(3) Not reported except in Shipping Gazette, 1890, p. 55.
(4) 60 L. T. 430.

took place in the North Sea off Whitby on the evening of the 21st of September, 1888. The result of the collision was that the *Vindomora* cut into the *Haswell*, and the *Haswell* sank, the *Vindomora* herself sustaining some slight damage.

The learned Judge who tried the case in the Admiralty Division came to the conclusion that beyond all question the *Vindomora* was to blame. He found that it was clear that she was wrongly navigated, that she ported in an unjustifiable and reckless manner, and that her speed had not been reduced in the manner which the Rules of Navigation demanded under the circumstances which existed in this case. From that judgment there was no appeal, and therefore before the Court of Appeal, as before your Lordships' House also, it must be taken as undisputed that the *Vindomora* was to blame.

But then arose the question whether the *Haswell* was also to blame. The learned Judge of the Admiralty Division held that the *Haswell* was to blame, upon the ground that she starboarded her helm at an earlier period than was admitted by her witnesses. The evidence of the witnesses called for the *Haswell* was that she had not starboarded until very shortly before the accident. It is admitted that at that time hard-a-starboarding was the proper manœuvre. If it were true that she had not so manœuvred at an early period, no blame could possibly be imputed to her. But it was said that the *Haswell*, although she had properly diminished her speed so as to be going dead slow, had in truth wrongly performed the manœuvre of starboarding.

The evidence of the witnesses on board the *Haswell*, as I have said, was directly to the contrary; but the conclusion reached by the Judge of the Admiralty Division was derived from a consideration of the nature of the collision between the two vessels; that is to say the position of the vessels respectively at the time of the collision, the view taken being that that was more probably accounted for by some starboarding on the part of the *Haswell* and porting on the part of the *Vindomora* than by the porting of the *Vindomora* alone. And the learned Judge relied further upon the circumstance that indications were given by the whistle on board the *Haswell* which tended to shew that she must have been at the time under a starboard helm.

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The view taken by the learned Judge appears to have been this: that if there was any appreciable starboarding on the part of the *Haswell* at that earlier period, so that the collision, such as it was, resulted in part from that starboarding and in part from the porting of the *Vindomora*, then the *Haswell* must be held to blame; and upon that ground accordingly he found both the vessels to blame. From that judgment the case went on appeal to the Court of Appeal, the only question being, was the *Haswell* to be held in any respect to blame?

Now, my Lords, it was argued by Sir Walter Phillimore on behalf of the appellants that if once the conclusion was reached that there was any appreciable starboarding on the part of the *Haswell* before those on board her knew the direction in which the *Vindomora* was going, the *Haswell* must be held to blame, because, he contended, there was a rule of practice always acted upon in the Admiralty Court, that where two vessels were approaching one another in a fog, neither vessel had a right to manœuvre in any way until she had a clear and unmistakable indication as to the course upon which the other vessel was proceeding or its relative position to her own. My Lords, I do not think the cases which the learned counsel cited support the proposition that there is any such absolute hard and fast rule as that a vessel having only the indication of a single whistle from the other vessel is never justified in manœuvring, and must always be held to blame if she does manœuvre. I should be very sorry to say anything to indicate any dissent from the view that where two vessels are approaching one another in a fog, without any sufficient indication to justify action, neither vessel would be justified in altering her course. I think the proper steps to be taken in such a case would be for each vessel to keep the course on which she was proceeding. But, although I entirely agree that that is a good general rule to lay down, yet that rule must nevertheless be interpreted in each case according to the circumstances of that case. It is impossible to lay down an abstract rule of that description which shall be applicable to all circumstances, to all parts of the seas, and to all positions of vessels. I do not understand the Court of Appeal to have thrown any doubt upon the suggestion that it is the general rule, and that in each

particular case you must look to see what the circumstances were, and inquire in each particular case, Were there circumstances existing which justified the manœuvre executed, or which prevented that manœuvre from being a wrong manœuvre?

Now, my Lords, when once you have reached the point that there is no arbitrary hard and fast rule, but that each case must be determined by a reference to the circumstances of the case, then we have to look and see at what conclusion the Court of Appeal arrived. The Court of Appeal, assisted by nautical assessors, arrived at the conclusion that even assuming (they did not determine the point one way or the other) that there was some starboarding on the part of the *Haswell* at an earlier period than her witnesses admitted, yet nevertheless that manœuvre was not a wrong one. That question was distinctly put to the nautical assessors. They were asked this: Taking the vessels to be in the part of the sea where they were, taking into account that which would be known as to the natural course of the vessels at that place, that which would be known as to the lay of the coast, and taking it that the whistle of the *Vindomora* was heard about as broad on the starboard bow as the witnesses of the *Haswell* allege, was there anything wrong in the *Haswell* starboarding? To that question the nautical assessors answered, without hesitation, Nothing. Now your Lordships are asked to disregard that finding and to overrule it. It is said first that the assumption upon which the question was founded was an assumption that ought not to have been made, and next that the answer was wrong.

My Lords, I think your Lordships would hesitate much, unassisted as you are here by any nautical experience, before you arrived at the conclusion that the answer thus given by the nautical assessors upon a pure question of seamanship, was an answer which you would pronounce to be erroneous; and, therefore, I, for my part, do not hesitate to say that it seems to me to be impossible for us, assuming the facts to have been properly put before them, to do other than follow the conclusion at which on a point of seamanship the nautical assessors arrived.

But then it is said that the question put to them was founded upon assumptions not in accordance with fact. No doubt if

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Lord Herschell.

that could be established, it would get rid of the importance and value of the nautical assessors' finding. That depends, and as I think from what I have heard, solely depends upon whether the Master of the Rolls was justified in coming to the conclusion, and assuming therefore in his question to the nautical assessors that those on board the *Haswell* did hear the whistle of the *Vindomora* some three and a half to four points on the starboard bow. As regards that point, the witnesses on board the *Haswell* state that they did so hear the whistle. Scarcely a question was put to them in cross-examination to throw a doubt upon the statement which they so made. It seems to me almost to have been accepted. There is certainly nothing in the findings in the Court below by Butt, J., to justify the conclusion that he thought the statement on that point erroneous; on the contrary, he practically accepts as reasonable and consistent the whole of the story of the *Haswell*, except as to the period of time at which she began to starboard.

Then is there anything in the probabilities of the case to render it inconceivable that the witnesses on board the *Haswell* did hear the whistle of the *Vindomora* as they describe? I have listened with attention to the zealous and ingenious arguments which have been presented to your Lordships, but they have not infused into my mind any conviction that the story told is either an impossible or an improbable one. It seems to me that the suggested impossibility or improbability depends very much upon your accepting on certain points the story told by those on board the *Vindomora*; but inasmuch as I am not disposed to place any reliance, or to act in the least upon anything said by the witnesses on board the *Vindomora*, after what the learned Judge said in the Court below, as well as after the discussion of their evidence here, it seems to me that you cannot assume any of their statements to be facts for the purpose of shewing that this story is inconceivable or improbable.

Under these circumstances, my Lords, I do not think it has been made out that the question put to the nautical assessors by the learned Judge, was founded upon any misconception of the evidence, or upon any erroneous conclusion as to its effect. That being so, I am prepared to recommend to your Lordships

to act upon that finding, and to come to the conclusion that it is not made out that the *Haswell* in this case acted wrongly. The *Vindomora*, beyond all question, broke the statutory rule. The utmost that can be said in the case of the *Haswell* is that one has to consider whether there was an act or a neglect which would not have been done or committed by a skilful and prudent seaman. It seems to me that that question is completely answered by the finding of the Court of Appeal, from which I am not disposed to differ.

My Lords, another question arises. Even assuming that there was some improper starboarding on the part of the *Haswell*, it is necessary for the *Vindomora* to establish that that contributed or conduced to the accident, which I understand to mean this, that but for the starboarding by those on board the *Haswell* the accident would not have taken place. If there would equally have been a collision between the two vessels, although the *Haswell* had not starboarded, then although the collision might not have been exactly in the same place, or the two vessels might not have struck one another in precisely the same way, it cannot be said that the case against the *Haswell* has been made out. I do not think this proposition was denied by the learned counsel for the appellants, except that it was attempted to shift the onus of shewing that from the *Vindomora* to the *Haswell*. I will not enter into the question now upon whom the onus lay, whether it was for the *Vindomora* to shew that it was the act of the *Haswell*, and that the collision would not have occurred if the *Haswell* had not so manœuvred, or whether it was for the *Haswell* to excuse herself in that way; because what we have to deal with is a determination by the nautical gentlemen, or rather a determination of the Court on the answer of the nautical gentlemen to the question, "Did the starboarding of the *Haswell* in your opinion conduce to this collision?" and their answer is, "No, not at all." If that be the case, it has not been established that the *Haswell* is to blame for this collision, so that she is to be held jointly responsible for it with the *Vindomora*. And I have heard nothing to lead me to the conclusion that the finding of the Court below on this point was wrong.

My Lords, under these circumstances I submit that the

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judgment of the Court of Appeal should be affirmed, and this appeal dismissed with costs, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, in agreeing with the judgment which has been moved, I have no wish to cast any doubt upon the soundness of the rule that when a vessel at sea, overtaken by a fog, becomes aware that another vessel is in her neighbourhood she ought, whilst complying with the regulations as to speed, to keep on her course unless she has some indications more or less reliable that it would be proper or at least safe to change it. What indications would be sufficient to warrant a change of course is a question of fact which must depend upon the circumstances of each case. In the present case the Court of Appeal have not thought it necessary to decide whether the *Haswell* starboarded on the first or on the last whistle heard from the *Vindomora*. Their Lordships assumed that she began starboarding as soon as she heard the first of those signals, and on that assumption they put a specific question to the nautical assessors, who in answer advised their Lordships that taking into account these three things, first, the part of the sea in which the two vessels were; secondly, the natural course of the two vessels and the lay of the coast; and, thirdly, the fact that the *Vindomora's* whistle was heard at from three and a-half to four points on her starboard bow, the *Haswell* did nothing wrong in starboarding.

That finding if accepted is absolutely conclusive in favour of the *Haswell*. We have been asked to reject it. I can only say that I am not disposed to treat lightly any finding of nautical assessors, and least of all when, as in the present instance, their finding is plain and unequivocal. Notwithstanding the very plausible argument to which we have listened from the Bar, I have heard nothing from the learned counsel which leads me to doubt the soundness of the advice which was given to the Court of Appeal.

I think as little cause has been shewn by the learned counsel against the second finding of the assessors, which of itself would entitle the *Haswell* to a judgment exempting her from blame even if the first finding had been against her.

LORD BRAMWELL:—

My Lords, I concur.

LORD MORRIS:—

My Lords, accepting the rule as laid down by my noble and learned friend on the woolsack, and my noble and learned friend opposite (Lord Watson), it appears to me to be a rule founded upon common sense as well as upon seamanship that if two vessels are in a fog in the same neighbourhood, it is better for them to continue on the course they are on, instead of altering it groping about and probably thereby causing a collision which might not otherwise occur. At the same time it appears also to me to be a principle of common sense and good seamanship that when two vessels are near together in a fog, and the one receives a sufficient indication of the position of the other, there is no rule, and there could be no rule, that the vessel which receives such an indication and thereby has good reason for changing her course should not do so. Accordingly, in this case, as I understand, those acting for the *Vindomora* do not allege that if the *Haswell* had waited until the second whistle had been heard from the *Vindomora* there would not have been sufficient indication and sufficient good reason for the *Haswell* starboarding her helm. That is the case made, as a matter of fact, by the *Haswell*, and for myself I must say that I am not at all satisfied that it is not a true case. It was the case that was proved by evidence at all events upon the trial before Butt, J. He was disposed not to give credence to it, relying upon reasoning not arising from matters of fact proved directly upon the point, but reasoning arrived at from other admitted facts, such as that the master had made a deposition somewhat inconsistent with that statement, and from the nature of the collision and from other circumstances referred to by him. I merely guard myself by saying that I am not at all satisfied that the case made by the *Haswell* was an untrue one and that they did not wait until the second whistle from the *Vindomora* was heard before starboarding. But, my Lords, it appears to me that there is nothing magic in waiting for a second whistle rather than acting upon the first whistle if

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the first whistle shewed sufficient indication and gave good reason for the *Haswell* altering her course. A question on that point has been submitted to the nautical assessors, and the accepted state of facts to a great extent was put to them, namely, that the *Vindomora* at the time of the first whistle being heard was some three and a-half to four points on the starboard bow of the *Haswell*. That is deposed to by several witnesses, and it does not appear to have been to any material extent controverted at the trial before Butt, J. Upon that state of facts the nautical assessors say that under the circumstances existing in this case upon the first whistle coming from a vessel that bore three and a half to four points on the starboard bow of the *Haswell* it would be a sufficient indication and a good reason for the *Haswell* altering her course.

Upon these grounds I entirely concur in the judgment which my noble and learned friend on the woolsack has moved.

Judgment appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 5th December 1890.

Solicitors for appellants: *Botterell & Roche.*
Solicitors for respondents: *Gellatly & Warton.*

[HOUSE OF LORDS.]

THE TREDEGAR IRON AND COAL COMPANY, LIMITED . . . . . } APPELLANTS;

AND

THE OWNERS OF THE STEAMSHIP "CALLIOPE" . . . . . } RESPONDENTS.

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THE "CALLIOPE."

Ship—Damage — Wharf — Wharfinger, Liability of—Obstruction in bed of River—Riparian Owner—Negligence.

The decision of the Court of Appeal (14 P. D. 138) reversed, and the decision of Butt, J., restored, on the ground that as the facts really stood there was no evidence of any breach of duty on the part of the wharfingers, and that the injury to the ship was caused by the captain and pilot attempting to berth her alongside the wharf at a time of the tide when it was not safe for a vessel of her draught and trim.

APPEAL from an order of the Court of Appeal (Lord Esher M.R., Cotton and Lindley L.JJ.) reversing a decree of Butt, J. in the Admiralty Division (1).

This appeal turned mainly upon the real effect of the evidence given at the hearing before Butt J., their Lordships in this House taking a different view to that taken by the Court of Appeal. The whole of the material facts are stated in the judgment of Lord Watson, and the statement of claim and amendments thereto are discussed in that judgment and also in that of Lord Halsbury, L.C.

1890. Dec. 5, 8, 9, 15. *Finlay* Q.C. (*Joseph Walton* and *A. Adams*, with him) for the appellants:—

The decision of the Court of Appeal was based on an erroneous view of the facts. The appellants are not, as the Court supposed, lessees of the bed of the river, and there was no evidence that they were, or that it was in their possession or under their control. This seems to have been the ground of the decision: and with it the reasoning built on it falls away. There was no

(1) 14 P. D. 138.

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evidence of any duty on the appellants to do anything to the bed of the river. No doubt they might as lessees of the wharf scrape the bottom of the river for their own purposes provided they did not affect the rights of anybody else, but they were under no obligation to do so. There was no evidence that the bottom of the river was in an abnormal or improper condition, or in any other state than a muddy bottom always is in when vessels lie alongside a wharf. There is no duty on a wharfinger to scrape the bottom each time a vessel leaves his wharf. Whatever the condition of the bed was, the pilot knew or might and ought to have known it. The case on negligence then fails from the absence of evidence of any breach of duty. Whether a vessel could safely approach the wharf depended on the state of the tide and the draught and trim of the vessel. This was a matter for the captain and the pilot. There was no misrepresentation by Griffiths. He told the captain the truth as to the tide and referred him to the pilot. But if there had been, Griffiths had no authority from the appellants to make representations or to order the vessel to come in. The damage arose entirely from the captain not waiting for another tide and choosing to run the risk against which the pilot warned him.

Gorell Barnes Q.C. and *W. S. Robson* (*H. Holman* with them) for the respondents:—

The appellants as wharfingers and riparian owners had the right and were under the duty to exercise control over the bed of the river in front of the wharf. The duty of a wharfinger is plainly stated in *The Moorcock* (1). He must either keep the part of the bed which is in front of the wharf in a reasonably fit state for vessels to use or, if it is not fit, he must warn vessels intending to enter. The wharfinger would clearly be liable if there were an anchor or any other obstruction which would injure a ship as she lay in the berth, and it is the same thing if there is an obstruction in the way of the ship getting to the berth. The appellants ought either to have kept the ridge down or to have warned the captain. There was evidence that it had always been the practice of the defendants to employ men at intervals of a week or two to

(1) 14 P. D. 64, 69.

clear away accumulations of mud from the berths adjoining the wharf. This had not been done so as to make the bed reasonably safe and there was evidence of neglect of duty. The respondents were moreover misled by Griffiths' letter. The representation in that letter that the appellants had two feet more water than the Bathurst Basin applied not only to the lying berths but to all that part of the premises which they were in the habit and under the obligation of keeping in order. And that was untrue. Griffiths was appointed by the appellants to direct ships entering, and clearly had authority. The law laid down by the Court of Appeal is founded on decisions. In *Curling* v. *Wood* (1) the wharfinger was held liable for placing an obstruction in the river. Here the appellants placed the respondents' vessel where the obstruction was. See also *White* v. *Phillips* (2); *Reg.* v. *Williams* (3); and *Mersey Docks Trustees* v. *Gibbs* (4).

The appellants' counsel were not heard in reply.

LORD HALSBURY L.C.:—

My Lords, I cannot help thinking that this case affords a somewhat important illustration of the necessity of calling upon litigants to place in some written form of pleading the precise cause of action upon which they rely, for I think that the time during which your Lordships have been occupied and the time which has been occupied in the courts below has to a considerable extent been the result of an oscillation in the minds of the advisers of the plaintiffs as to what was their cause of action.

My Lords, I cannot entertain a doubt, when I look at the form of the statement of claim as it originally stood, that the cause of action was originally founded upon the notion that this vessel was invited to a berth, in the strict and proper sense of that word, at which it was unfit for a vessel under any circumstances to lie, and that by reason of the inequality and unfitness of the berth the vessel being brought there was strained and injured. If that had been the complexion of the case, I certainly entertain no doubt that the law as laid down in the earlier cases and in the

(1) 16 M. & W. 628.
(2) 33 L. J. (C.P.) 33.
(3) 9 App. Cas. 418, 431.
(4) Law Rep. 1 H. L. 93.

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later case of the *Moorcock* (1) would have been applicable to that state of things. In this case the wharfinger, who happens to be the consignee, invites the vessel to a particular place to unload. If, as it is said, to his knowledge the place for unloading was improper and likely to injure the vessel, he certainly ought to have adopted one of these alternatives: either he ought not to have invited the vessel or he ought to have informed the vessel what the condition of things was when she was invited, so that the injury might have been avoided.

But, gradually, as the case proceeded it apparently occurred to the parties that that ground could not be maintained and that the vessel if it had got there would have been perfectly well able to lie there in a fit and proper place for unloading, and no injury would have resulted; and then came an application to amend, to which the learned Judge acceded. The amendment is of this character, that the persons who were in charge of the operation of bringing the vessel to the berth were guilty of negligence. Who those persons were I will say in a moment. The nature of the negligence alleged is this, that in the ordinary condition of things a vessel of that draught could not properly get to that berth at the particular time of the tide, and a Mr. Griffiths is alleged to have misled the pilot and the captain as to the safety with which that vessel might get there to lie there.

Let us see what the meaning of this contention is and upon what ground it is suggested that the wharfinger and consignee was guilty of the negligence imputed to him. He in the first instance, as he had a right to do, gave a direction that the vessel should come and unload at that wharf. If under no circumstances and at no time the vessel could have gone to that wharf—though in that case, as I think, a serious question would arise as to whether it is not for the captain or the pilot as representing the shipowners to make up his mind whether he can safely get to that place or not, and to make his election whether he will or will not attempt to do so with a view to safety—still if under no circumstances the vessel could with safety have gone there, and if he had relied upon that statement for the purpose of getting there, a different question would have arisen. But the facts do

(1) 14 P. D. 64, 69.

not raise that case, because as I understand the facts relied upon, there is given in the letter the draught of water which under ordinary circumstances may be expected at the particular time, and at the same time as that direction is given the writer says, "But your pilot will tell you what to do." What is the meaning of such a phrase as that? What is the suggestion when the person to whom the direction is given is told to rely upon the pilot? What does a pilot do? What is a pilot's duty? It is impossible to doubt that under ordinary circumstances that would mean this: This is information which I give you for the purpose of forming your own judgment whether you can come there or not; that is to say, this is the height of water which may be expected at such and such a time, but you, the person in charge of the navigation of the vessel, the captain or the pilot, must form your own judgment upon the matter, and you must not expect me to give you a warranty that that height of water will exist; but you, the captain or the pilot, must form your own judgment upon it, and must act accordingly.

Under the particular circumstances of this case it appears that the utmost amount of water which could possibly be expected at the top of the tide was 18 ft. 9 in., and that depended upon a comparison between the Bathurst Basin at Bristol and this Tredegar Wharf, between which there was said to be, under the ordinary condition of things, a difference of 2 ft. in favour of the Tredegar Wharf. The vessel in question was drawing aft 18 ft. 3 in.; and at the top of the tide therefore, assuming everything to be normal in the condition of things with which the parties were dealing, there would be six inches to spare and that was all. The facts appear to be that about an hour and a half before the top of the tide the vessel attempted to get in. I think it is idle to say that she was there for the purpose of attempting to get in at the top of the tide. It is manifest to me from the evidence that she attempted to get in long before the state of the tide would have justified her doing so, and it was as absolutely certain as any calculation could make it, not only that she was likely to ground, but that she must ground if she attempted it. And she did attempt it.

Then it is said that Mr. Griffiths encouraged the pilot and the

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captain to come in, and in fact the phrase is used that he "gave orders." I think in the course of the argument it has been sufficiently pointed out that the use of those words is inaccurate if understood in the sense that Mr. Barnes has relied on. That a foreman, who is concerned with the regulation and management of the wharf, in a certain sense "gives orders" is true enough. He has a right to assume that the captain and the pilot who are navigating the vessel alongside the wharf will navigate her safely; but when it comes to a question of what particular position alongside the wharf or what berth the vessel is to occupy with reference to the loading and unloading of the goods the person on the wharf is the person to give directions at what particular part of the wharf, and how, the vessel shall be moored; because with reference to the cranes and other machinery at the wharf for loading and unloading the vessel it may be important that the person in charge of the wharf should give such directions, and accordingly Mr. Griffiths appears to have given such directions. But is it contended for a moment that either the captain or the pilot would understand that Mr. Griffiths was in a position to give orders to the captain or the pilot with reference to the approach of the vessel, or information as to the water she would draw? The absurdity of such a proposition is at once apparent when it is remembered that this question not only depends upon the absolute depth of the water either at the top of the tide or an hour and a half before it, but also has relation to the draught of the vessel, with which the captain and the pilot may be supposed to be perfectly familiar, but which would be totally unknown to Mr. Griffiths on the wharf.

My Lords, that words which appeared to resemble orders may have been used by Mr. Griffiths when once the difficulty had arisen and it was found that the vessel was incapable of reaching the wharf, is exceedingly likely. I should concur with Mr. Justice Butt in the opinion that while each side perhaps has given a colour to the particular language used it is extremely likely that Mr. Griffiths used words which, understood literally and without reference to the relations existing between Mr. Griffiths and the captain or the pilot, might in one sense be described as orders; but that he gave orders in the sense of a command in

relation to the approach of the vessel to the side of the wharf, or that they so understood it or placed any reliance upon his words as being orders, I certainly do not believe.

But, my Lords, we are not left without guidance upon the subject, because the captain and the pilot themselves give, to my mind, an absolutely overwhelming proo that they knew perfectly well that what they were doing was an operation attended with risk, for the pilot himself said that he would not undertake the risk because he knew that he might lose his certificate, and that if it was done it must be done upon the responsibility of the captain. Now what does that disclose? In the first place it discloses an absolute intention not to rely upon any "orders" supposed to have been given to them, and in the second place it also shews that they knew that the operation was one which was attended with danger.

That brings me to the next point, What was the danger? The danger was a danger which has in fact been recognised by the pilot in the very first part of his evidence. He knew there were these inequalities in the bed of the river, inequalities owing to the nature of the river, to the nature of the soil of the bed of the river, and incident to the ordinary user of the bed of the river. Under those circumstances it is suggested that there was some duty, before any vessel came in, that this particular berth should be scraped even, so that the vessel should lie on an even keel the moment that she got up to within—I do not know that I am able to give verbal expression exactly to what is suggested,—but to within some reasonable distance of the wharf, within what I think Mr. Robson called "the sphere of their operations." That phrase was very adroitly used; it would comprehend something so vague that one cannot quite grasp it. The berth itself is admitted now to have been perfectly proper to be in, and how far this alleged responsibility for the approach to the berth extends I really do not know. I suppose, to put it most in favour of the respondents, it would be suggested that it extends as far as vessels coming in and lying at this wharf, and by lying there raising the ridge upon which so much has been said. Now upon that subject, whenever the question does arise, I hope I shall keep my mind perfectly free to have it

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discussed; but it is absolutely new to me to find that there is by law a responsibility or an obligation upon everybody using the river in a natural and normal way and, by lying on mud flats, raising by the operation described some of these inequalities so that another vessel coming in and lying there transversely might suffer injury. It certainly is a new proposition for which I should like some authority before affirming that such an obligation exists by law. I can only say, from one's knowledge of that part of the world, that it would be an obligation which would raise a very serious question indeed, because in particular states of the wind many hundreds of vessels may be seen lying on Cardiff flats, and lying side by side; and the character of the mud there is very much the same as that of the mud in the Usk; and if upon those vessels or their owners there is cast an obligation, when they sail away after the tide has come in, having left this impression, to remove those ridges and flatten them again, or if they neglect to do so to be subject to an action by the owner of some other vessel that comes in afterwards and lies across the ridges, it throws an obligation on the shipowners which I think they will do well to consider. It certainly is a very serious proposition to lay down, and one for which I should require some authority.

Then the contention is that this obligation exists, and that there was a hard substance left in front of this berth which ought to have been cleared away, and that by reason of its not having been cleared away this accident happened.

My Lords, with regard to that, which is in plain terms the contention which has been made, all I shall say is that I do not know whether that is so or not, but one difficulty is that there is no evidence. That this vessel was injured by lying in the place where she did lie is certain, but neither shipowner nor wharfinger ever intended that she should lie there. The mode in which she got stuck originally I have already referred to, but if it is said that that was not the normal condition of the bank in that place, all I can say is I have no evidence that that was so. There is the theoretic evidence (I admit) that wherever two vessels lie there they raise this ridge; but I do not know when two vessels did lie there; certainly there is no evidence of that

sort before us. If two vessels did lie there, I do not know that the ridge that was raised by their lying there was not scraped away.

Then it is said, "Well, but that lies within the knowledge of the defendants." In one sense that is quite true. There is no pretence of it on the other side; and it is part of the case for the plaintiffs that that amount of negligence is in the management of the wharf. That is part of the evidence which the plaintiffs ought to give, and the plaintiffs have given no such evidence. I do not know when the defendants last scraped the place, and I do not know that two vessels ever did lie there before this vessel, after the last scraping.

In the result, my Lords, it appears to me that putting it upon the grounds upon which this case was originally put there is a complete answer to it; and putting it upon the grounds which have been gradually brought forward in lieu of those originally insisted upon, the whole case is left absolutely without evidence. The only explanation I can give is, that the particular cause of action had not occurred originally to the advisers of the plaintiffs. Much as I respect any judgment of the Court of Appeal (particularly on such a case as this), presided over by the Master of the Rolls, when I look to see the grounds upon which the judgment of the Court of Appeal proceeded, it appears to me that they have assumed a state of facts without evidence to support it, and which for my own part I am unable to affirm.

I therefore move your Lordships that this appeal be allowed and that the respondents pay to the appellants their costs both here and below.

LORD WATSON:—

My Lords, upon the facts proved this appears to me to be a very plain case.

The cargo of the *Calliope*, consisting of iron ore, was deliverable at Newport to the appellant company, who were indorsees of the bill of lading. They were also in the occupation of a tidal wharf within the limits of the port of delivery, known as the Tredegar Wharf.

On the arrival of the *Calliope* at Newport about 2.30 P.M. on

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There are two berths at the Tredegar Wharf, one alongside the quay, and another just outside it, in which vessels lie when stranded by the receding tide. The *Calliope* was destined to the inner berth; and it is not now disputed that if she had got there she would have lain in perfect safety. At that part of the river Usk the foreshore is chiefly composed of mud varying in consistency, becoming harder and harder as it approaches the underlying rock. A loaded vessel when stranded presses upward the mud on either side of it; and when two vessels are lying side by side that pressure tends to form a ridge of mud between them, which remains after they leave. From the action of the

river a deposit of muddy silt rapidly accumulates upon the foreshore.

The appellant company are neither owners nor lessees of the foreshore upon which their wharf abuts; they have no rights except as members of the public; although their position as occupiers of riparian land gives them a use of the river and its adjacent solum for the purpose of loading and unloading craft which members of the public cannot enjoy without their permission. They cannot interfere with the natural condition of the foreshore in any way which could by possibility affect the flow of the river or its navigation. It appears that the appellant company and other wharfingers upon the Usk are in the habit at intervals of ten days or a fortnight of removing from their berths the mud deposit, because it impedes the floating of vessels with the rise of the tide, and also of scraping down the ridges or mud-banks between the berths.

On the Monday morning the *Calliope* was taken up the river under steam until she passed the Tredegar wharf. She was then turned round to port, and her course directed straight to the wharf. When her stem had got within a few feet of the lower end of the quay her stern took the mud and attempts made to berth her, by warping her stern towards the upper end of the quay, proved unsuccessful. The time at which she attempted to reach the berth was shortly after 4 A.M., more than an hour before full flood. She did not float at the top of the tide, and at low water her stem and stern were fast in mud, whilst amidships she rested upon, and was partly sunk into the ridge already described, which had been scraped down, as usual, about a fortnight previously. In that position her hull suffered damage, for which her owners are now seeking to make the appellants responsible.

The sole cause of action disclosed in the respondents' statement of claim was, that the berth which the appellants directed the *Calliope* to occupy was unfit for that purpose, being "in an uneven dangerous and defective condition." Had it been shewn that such was the fact, and that the injuries sustained by the *Calliope* were due to that cause, the present case would have been within the principle followed both by the Admiralty judge and

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the Court of Appeal in *The Moorcock* (1). In the course of the trial before Butt, J., the respondents put forward two new grounds of action, and asked leave to amend their pleadings in order to introduce them. One amendment was allowed by the learned judge, "in order to raise the question of negligence on the part of Griffiths, upon the assumption that he was intrusted with the authority to bring this ship in, and that his acts were the acts of the defendants." The second amendment proposed, to the effect that the statement in Griffiths' note as to the excess of water at the wharf beyond its depth at Bathurst basin was a material misrepresentation, by which the captain and pilot were misled, was reserved for consideration after the evidence was completed.

So far as concerns the amendment allowed, it is obvious that Butt, J., did not attach implicit credence to the account of Griffiths' actings given by the *Calliope* witnesses, which was contradicted by Griffiths himself and other witnesses for the appellants. But assuming that account to be true, it falls far short of shewing that Griffiths was either intrusted with or exercised authority in bringing the vessel to the wharf. The fair inference to be derived from it is, in my opinion, that the whole charge of navigating the vessel, and of bringing her alongside the quay was, from first to last, in the hands of her officers and pilot, and that Griffiths did and said no more than might naturally have been expected of a wharfinger's servant who was assisting to warp and moor her.

The other amendment, which was not expressly allowed, but was dealt with by Butt, J., in the course of his judgment, is equally without foundation in fact. I think with Butt, J., that the representation made by Griffiths was substantially true. According to the register kept, from actual observation, at Bathurst Basin, the extreme depth of water there on the morning in question was sixteen feet; adding two feet, that would only give eighteen feet at Tredegar Wharf, whereas the after part of the *Calliope* was drawing 18 feet 3 inches.

For these reasons, Butt, J., dismissed the suit. On appeal, his judgment was reversed by Lord Esher M.R. with Cotton and Lindley L.JJ., who condemned the present appellants in costs

(1) 14 P. D. 64.

and damages. Their Lordships did not deal with any of the questions raised in the Court below, but rested their decision on the ground that the appellants were lessees of a portion of the river bed ex adverso of their wharf including the space between the berths, and that they had failed in their duty to those in charge of the *Calliope* by neglecting either to remove the ridge or to warn the *Calliope* of its existence.

In their argument at your Lordships' Bar, the respondents mainly relied upon the cause of action which has been affirmed by the Court of Appeal. I hesitate to affirm the principle that a Court of Review ought to entertain a new ground of action of which the defendant had no previous notice, based upon inferences of fact derived from evidence directed to other points—inferences which the defendant might possibly have been able to explain away or contradict if he had been required to lead proof with reference to them. But in the present case I am satisfied that the inferences which the Court of Appeal has drawn are not warranted by the evidence.

The assumption that the appellants were lessees of the river bed is expressly negatived by the only passage in the depositions to which the respondents were able to refer. Yet it seems to have been regarded as an important factor in the case, and Lindley L.J. says that "the learned judge in the Court below failed to attribute sufficient weight to the fact that the ship was injured by grounding on the land of the defendants."

I do not doubt that there is a duty incumbent upon wharfingers in the position of the appellants towards vessels which they invite to use their berthage for the purpose of loading from or unloading upon their wharf; they are in a position to see, and are in my opinion bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf. If the approach to the berth is impeded by an unusual obstruction they must either remove it, or, if that cannot be done, they must give due notice of it to ships coming there to use their quay. I think it would be altogether unreasonable to hold that the river-bed in front of the Tredegar wharf was not in an ordinary condition of safety unless it was kept as level as a

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billiard table; the evidence shews that in the river Usk the stranding of a vessel necessarily occasions a certain rise of the mud above the adjacent level—that the creation of such a ridge as that between the appellants' berths is incidental to all the wharves on the river as well as theirs, and also that the scraping down of such ridges at intervals of time is the usual and only method which has been followed, at all these places, for enabling vessels to enter the inner berth in safety. It is proved that the appellants had not neglected to take the usual precautions for reducing the ridge; and it is not even suggested in the evidence that on the occasion when the *Calliope* stranded upon it, the ridge had attained greater dimensions or height than it usually did before the process of scraping came to be repeated in course.

In these circumstances I find it impossible to impute negligence to the appellants. I do not think that a seaman of ordinary skill would have experienced difficulty in ascertaining when the tide would be of sufficient depth to carry the *Calliope* safely into the inner berth; and I can hardly conceive of conduct more reckless than that of the persons entrusted with the duty of taking her there. They knew that safe access was a mere question of time, and that by waiting for high water on the Monday afternoon, or Tuesday morning at farthest, it could be secured. The pilot did not think that there would be enough of water; he knew that the attempt to take her in would put him in peril of losing his certificate; and the captain, who seems to have had no personal knowledge of the locality, was aware of the pilot's opinion. Both were in fault, and it is unnecessary to consider the proportion of blame attaching to either, because the present case is between ship and wharf, and the ship must be answerable for what they did either singly or jointly.

One other observation occurs to me upon the facts of this case. I think it is proved that the existence of the ridge was not the cause which prevented the vessel from getting into berth. It has never been suggested that the muddy solum upon which her sternmost part rested was in an abnormal or unsafe condition, either as regards level or otherwise. According to the captain, whose evidence on the point is uncontradicted, her

stern only was aground until after the tide began to ebb, when for the first time she grounded amidships; so that, until she grounded on the ebb, her midships must have been afloat above the ridge for the period of an hour at least. During that period efforts were made to warp her into the berth; and it is plain that these were defeated, not by the ridge, but by the fact that her stern was too fast in the mud. If the grounding of her stern was due to the negligence of those in charge of the *Calliope*, I cannot understand upon what principle the appellants could be made responsible for her being held fast by the stern in such a position that she stranded upon and was injured by the ridge when the tide ebbed.

I therefore concur in the judgment proposed by the Lord Chancellor.

LORD HERSCHELL:—

My Lords, I am of the same opinion. I think, as my noble and learned friend has pointed out, that there was some misapprehension on the part of the learned Judges in the Court below which influenced their decision and led, to some extent at all events, to their differing from the learned Judge whose judgment they were reviewing. What I conceive to have been the misapprehension is put most pointedly in the judgment of Lindley L.J., who says that he thinks "sufficient weight was not given by the learned Judge in the Court below to the fact that this ship was injured by grounding on the land of the defendants;" and later on he speaks of them "as occupiers of the place and having control of the bed of the river," and says that this "was not sufficiently attended to by the learned Judge in the Court below." Both the Master of the Rolls and Cotton L.J. speak of the defendants having been lessees of the particular part of the bed of the river where the accident occurred. Now, the learned counsel for the respondents, being pressed upon this point, have entirely failed to shew the slightest foundation for any such allegation. I do not understand that the appellants had in any way whatsoever a control of this part of the river; nor do I think it is accurate to say, as was said by Cotton L.J., that the unevenness of the bed of the river was

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caused by the appellants' mooring for their own purposes vessels opposite their wharf.

My Lords, the real position of things I take to be this. Persons navigating the river with vessels have a right to discharge those vessels at any convenient and suitable wharf along its course; and when a vessel grounds and lies near a wharf for the purpose of discharging, that is as much a natural use by the vessel of the river as is her use of it in being water-borne to the place where she is to discharge; and when she is in that position for the purpose of discharging, her situation there and the discharge are as much her concern as they are the wharfinger's, and are as essentially a part of the mode of using the river for the purposes of navigation as any other. Therefore, with all respect to the learned Judges in the Court below, I approach the case from an entirely different standpoint. It appears to me that these ridges or elevations in the bed of the river were caused by the use of the river by vessels navigating it in one of the ordinary modes in which a river is used; and to attribute them to the wharfinger, to speak of them as if they were his work and the result of acts done by him, is, in my judgment, with all respect, to misapprehend the real state of things and the relation of the parties. No doubt it is to his advantage that ships should discharge at his wharf. On the other hand, it is an advantage to the ships that they should go to the place of discharge where the products which they carry are commercially required.

Therefore, my Lords, I am by no means prepared to say that there was any legal obligation on the part of the appellants, when vessels had been lying at their wharf, to remove all unevenness from the bed of the river in order that it might become a perfectly level surface again, any more than there was an obligation on the ships which had caused the elevation to remove that elevation themselves. I will deal in a moment with duties which might under certain circumstances conceivably arise, which might cast an obligation upon the wharfinger; but I am only saying that the mere fact that vessels so lie and cause a difference of elevation in different parts of the river does not in itself appear to me to involve necessarily any such obligation as is suggested.

Now, my Lords, I do not for a moment deny that there is a duty on the part of the owner of the wharf to those whom he invites to come alongside that wharf, and a duty in which the condition of the bed of the river adjoining that wharf may be involved. But in the present case we are not dealing, as were the learned Judges in the cases which have been cited to us, with a condition of the bed of the river in itself dangerous—that is to say, which is such as necessarily to involve danger to a vessel coming to use the wharf in the ordinary way; and we are not dealing with a case of what I may call an abnormal obstruction in the river—the existence of some foreign substance or some condition not arising from the ordinary course of navigation. If the mischief had arisen from the bed of the river adjoining the wharf being in such a condition that a vessel invited there could not, even if she had come in at the most fitting and proper time of tide, have lain there in safety, it may well be that there would have been a cause of action. But the peculiarity of the present case is that it was all a matter of time and degree. Whether it was safe to come or not depended upon a variety of elements. There was no necessarily inherent danger in the condition of the bed of the river. If this vessel had been of a somewhat lighter draught she might have come safely to this wharf when she did, and, having got safely to her berth, have remained uninjured. If, on the other hand, being of the draught that she was, she had waited for a later time of tide, she might equally have come in safely, and have discharged her cargo absolutely uninjured. But the mischief arose from the fact that, being of the draught she was, she came at the time she did, and attempted then to do that which she might safely have done later, or that which a vessel of a lighter draught or on a more even keel might have done at that time.

Now, under those circumstances, apart from the question of representation with which I shall deal in a moment, can it be said that there was a breach of duty on the part of the appellants? My Lords, what was their duty? Was it to keep the bed of the river adjoining their wharf in such a condition as that at all tides any ship, however heavy her draught, might come in? Such a proposition surely can hardly be contended

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for. Then why was there an obligation in respect of this ship at that particular time or at any particular time, indeed, that could be named? (I mean, of course, apart from the alleged representation). I am wholly unable to see. That proves that this case differs altogether from any of those which have been cited, because here the accident, such as it was, arose entirely from the circumstance of a vessel with this draught, coming in on this particular tide.

My Lords, if the obstruction which created the difficulty in the approach of this vessel to the wharf at this particular tide, had been one caused by some unusual and extraordinary circumstance which those navigating the river would have no right to anticipate, but which would be known to the wharfinger, then I quite agree that some duty on his part would arise towards them, and in the absence of warning, it may be that he would be under some responsibility. But the truth is, that the pilot knew perfectly well that these inequalities did arise at all the berths in the river from time to time, owing to vessels lying there. No doubt, from time to time at different places, some scraping took place for the purpose of lowering the level of these elevations. I have already expressed my doubt whether, although that work was undertaken by the wharfingers, it was in pursuance of any duty incumbent upon them. It was perfectly natural that they should undertake it in their own interest, because, of course, if these elevations were allowed to increase, it would render access to their wharves more difficult. The witness called for the defendants on this part of the case, explained that it was for this reason that they did scrape from time to time, in order that the access to their wharf might not be interrupted to the extent that it would otherwise be; but it may be doubted whether it was not in their own interest rather than in the discharge of an obligation that they from time to time scraped these elevations. I would say this, that it was not by reason of their having any control over this part of the river in any peculiar sense, or having any superior right to that of any other member of the public, that they undertook this work, or would be able or entitled to undertake it. I apprehend that, being riparian proprietors, they would have a right to execute such work in the

neighbourhood for the purpose of improving the access to their wharves as they might be advised to execute, provided that in so doing they did not prejudicially affect or interfere with the rights of any third persons, or the rights of the public. Subject to the rights of the public and subject to the rights of any third persons not being interfered with, I do not suppose that they could be in any way rendered liable for thus dealing with the bed of the river in the neighbourhood of their wharf.

Now, my Lords, as I have said, this is not a case of anything foreign or strange in the condition of the bed of the river. It is one of the results of the normal use of the river; and all that can be said is, that the wharfingers may not on this occasion have done as much as they had previously done to remove the elevations caused by that use of the river; but, certainly, it is to my mind impossible to say that, even if they did to some extent omit to do what they had done on previous occasions (and all the evidence as to that is of the vaguest description), they failed in their duty towards those who were about to approach their wharf.

My Lords, that to my mind, apart from the question of the letter and the representation contained in the letter, is sufficient to dispose of the case. One observation I may make connected with the representation which the appellants made; it is this, that, if on the one hand the condition of the bed of the river may be said to have been a matter peculiarly within the knowledge of the appellants, on the other hand the draught of the vessel, which was of at least as great importance in determining whether the vessel could approach the wharf or not, was peculiarly within the knowledge of the respondents; and to say that the respondents who had this knowledge, which they would know would not in the ordinary course be in the possession of the appellants, were entitled to rely upon a statement made to them by the appellants, as to their being able to get safely to the wharf at a particular time, appears to me a somewhat startling proposition. No doubt the letter of Griffiths does represent that in his opinion (and there is no reason to doubt that it was honestly his opinion) the captain could bring the steamer to the

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Tredegar Wharf on Monday morning's tide. But, surely that could not absolve the shipowners, or those who were in charge of the ship, from the responsibility of considering for themselves whether it was possible. As I say, presumably the man who gave that information would not know, as they would, the draught of the ship and her trim; because if this ship had been of the same mean draught, but that draught had been on a different trim, it would very likely have been the case that the vessel would have made her way in with safety. Therefore, I do not think that this letter can be taken as an invitation to come in under all circumstances, or an assertion that they can come in under all circumstances, but it must be taken merely as a general statement of what the condition of the water at the wharf was in comparison with the berth at Bathurst basin, and what therefore they would have a reasonable right to expect under ordinary circumstances, of course assuming that those who were navigating the ship would know that they must make sufficient allowance, because the bed of the river in the neighbourhood of the wharf might not be in a perfectly even condition. It seems to me to be out of the question to suppose that it is a right and proper thing to run the matter so fine, that if you have six inches of elevation at any particular point near the wharf above the surface of the bottom of the berth itself, you will have too little water. I cannot think that it was really a prudent thing to run it so fine as that, and I think that a greater margin ought to have been left in order to ensure reasonable safety.

With regard to the representation, it is not alleged as a deceit, it cannot be put as a warranty—the utmost the plaintiffs can allege appears to be a representation by the foreman in charge of the wharf of his belief, he being ignorant of that which those on board knew, namely, the draught of water of the vessel, on which depended the possibility or not of getting this ship on to the berth.

Under these circumstances, I am unable to see any breach of duty on the part of the appellants rendering them liable to this action, and I concur with the motion which has been made.

LORD MORRIS:—

My Lords, I concur.

Judgment of the Court of Appeal reversed, and judgment of the Admiralty Division restored with costs here and below: cause remitted to the Admiralty Division.

Lords' Journals 15th December 1890.

Solicitors for appellants: *Pritchard & Sons, for Vaughan & Hornby, Newport.*

Solicitors for respondents: *Downing, Holman & Co.*

[HOUSE OF LORDS.]

W. & T. ADAMS AND OTHERS . . . . . APPELLANTS;

AND

THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY . . . . . } RESPONDENTS.

Arbitration—Reduction of Decree Arbitral—Jurisdiction of Arbitrator—Scotch Act of Regulations, 1695, *s.* 25—*Constructive Corruption of Arbitrator.*

The Act of Regulations of 1695, which provides that "for the cutting off of groundless processes in time coming the lords of session sustain no reduction of any decreet arbitral pronounced on a prescribed submission upon any cause or reason whatsoever unless that of corruption, bribery, or falsehood to be alleged against the judges arbitrators" was intended to put an end to the practice which had previously obtained of reviewing awards upon the merits; but not to prevent the courts from setting aside an award where the arbitrator has exceeded his jurisdiction, or has disregarded any one of the expressed conditions of the submission, or the conditions implied by law, or has been guilty of misconduct in the course of the reference or in the making of the award.

There is nothing to warrant the conclusion that the word "corruption" in the above Act of Regulations should receive any other than its ordinary construction, and it cannot be taken to include irregular conduct on the part of the arbitrator with no suggestion of any corrupt motive.

The appellants contracted with the respondents, a railway company, to construct two sections of a railway: the second section to be ready on the 30th of September, 1884, "or on or before such respective days thereafter as might be respectively fixed by the arbiter after named," the appellants to be liable in all damages occasioned by their failing to complete the

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works, and as compensation for loss of profits should the sections not be in a state to be open for traffic by the times stipulated, the appellants to be bound to pay the respondents £20 as the liquidate and agreed on compensation for every day which the sections should remain unfinished. The contract contained a clause referring to an arbitrator "all disputes and differences which should arise between the parties in reference to the contract or in regard to the construction of it, or of the specifications, conditions, and schedules." The specifications and conditions for the construction of the second section contained a clause to the effect that a specified portion of the embankment of the line should not be formed until the contractor for the bridge over the river Spey had completed the works in connection with the erection of the east abutment of the bridge, &c. The line was not completed till the 1st of May, 1886.

On application to the arbitrator after the time specified for the completion of the works as to the settlement of their accounts under the contracts, he found the appellants entitled to an extension of six months as regarded the completion of the second part of the works, but that they were liable in penalties for each day's delay from the 30th of March, 1885, to the 1st of May, 1886. It appeared that the appellants did not obtain access to the ground on which the embankment was to be formed till February, 1886:—

Held, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series (Rettie) 843), that the award was good on the face of it, and there was no evidence that the arbitrator had awarded damages in respect of delay caused by the bridge not being completed.

Opinion expressed in *Alexander* v. *Bridge of Allan Water Co.* as to "constructive" corruption (7 Court Sess. Cas. 3rd Series (Macph.), at p. 498), disapproved.

APPEAL from the First Division of the Court of Session, Scotland (1).

In 1883 Messrs. W. & T. Adams, the appellants, entered into contracts with the Great North of Scotland Railway Company, the respondents, for the construction of two portions of the respondents' railway. First, for the line from Portsoy to Portnockie divided into two sections—Portsoy to Tochieneal and Tochieneal to Portnockie—to be completed by the 30th of September, 1883 and 1884 respectively; and secondly, for the line from Portnockie to the river Spey, called subsequently the Buckie section, to be completed by the 30th of September, 1884.

The material provisions of the contract were substantially as follows:—

That any delay in giving possession was not to give the ap-

(1) 16 Court Sess. Cas. 4th Series (Rettie) 843.

pellants a right to demand damages or to break the contract, but might be stated to the arbitrator as a reason for non-completion within the time stipulated; and should it appear to the arbitrator that the appellants were prevented from completing the works by that delay, or by any stoppage not imputable to them, the arbitrator should be entitled to extend the time for completing the same. But of the propriety of extending the time, and the length thereof, the arbitrator was to be the sole judge.

That the appellants should be liable in all damages occasioned by their failing to complete the respective works by the times stipulated, and as compensation for loss of profits they should pay to the respondents £20, as the liquidated and agreed on compensation, for every day during which each of the respective portions of the line or any part thereof should remain in a state not admitting of its being opened for public traffic after the 30th of September, 1883, and the 30th of September, 1884, respectively, or such extended period as the arbitrator might determine.

It was also agreed and provided that all disputes and differences which had or might arise between the parties, under or in reference to the contract, or in regard to the true intent, meaning, and construction of the same, or of the specifications, conditions, and schedules, or as to what should be considered as carrying out the work . . . or as to any other matter connected with or arising out of the contract, and generally all disputes and differences in any way connected with the construction of the contract, should be referred to the arbitration of B. H. Blyth, C.E., whom failing to G. Cunningham, C.E., and that neither of these gentlemen should be disqualified from acting as arbitrator by becoming the respondents' principal consulting engineer, or by holding any other employment or office under the respondent company. B. H. Blyth's firm were the consulting engineers to the respondent company; and it was alleged that Mr. Blyth had revised the specifications, and had under-estimated the probable cost of the works.

The specification to the Buckie section contract contained this clause:—

The portion of the embankment of the line, between pegs

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Nos. 892 and 899, shall not be formed until the contractor for the bridge or viaduct over the River Spey has completed the works in connection with the erection of the east abutment of bridge, the diversion of the river, and the erection of the protection walls embraced in the contract for the Spey Bridge, or until he has received the written instructions of the engineer or assistant-engineer to proceed with the formation of the said portion of the embankment.

The works were carried on very slowly; and in 1883 remonstrances were addressed to the appellants. Again in December, 1885, the respondents by letter made a formal complaint and called upon the arbitrator to pronounce the necessary order authorizing them to provide at the expense of the appellants the requisite men and materials necessary to finish the works. In consequence of this letter the arbitrator met the parties. After the meeting the appellants—8th of December, 1885—wrote saying they undertook to finish the works by the 15th of February, 1886, unless prevented by some unforeseen occurrence. The clerk to the submission, by Mr. Blyth's directions, replied on the 9th of December, 1885, that he still had the respondents' letter before him, and that the manner in which he would ultimately deal with it would depend on the information he received within the next ten days as to what steps were being taken by the appellants with a view to the completion of the works on or before the 15th of February next. The first sub-section of the Portsoy to Portnockie contract was completed on the 1st of April, 1884; the second sub-section and the Buckie section were both finished on the 1st of May, 1886.

On the 7th of November, 1887, an appeal was made to Mr. Blyth as arbitrator. After a proof the arbitrator pronounced two awards by which he found the above-mentioned dates of completion; that he was entitled to extend, and he did thereby extend, the time for completing the second sub-section of the Portsoy contract and the Buckie section six months; and that on the other hand the respondents were entitled to claim from appellants compensation or liquidated damages at the rate of £20 per day for loss caused to the respondents through the aforesaid delay in completing the work, beyond the date of

completion specified in the contracts and as extended by him. It appeared from the notes of the proposed findings, mentioned in the award as having been sent to the parties, that the arbitrator, after deducting the extension of time of six months in the second sub-section of the Portsoy contract, and in the Buckie section, found the appellants liable in the Buckie section for 340 days, namely, from the 30th of March, 1885, to the 1st of May, 1886; in the first sub-section of the Portsoy contract for 157 days, namely, from the 30th of September, 1883, to the 1st of April, 1884; and in the second sub-section of the Portsoy contract for 340 days, namely, from the 30th of March, 1885, to the 1st of May, 1886, or in all 837 days, at a compensation of £10 per day. This rate of £10 per day the arbitrator in his award increased to £20 per day; and he explained in his evidence that he did this as the result of consultation with counsel. Taking the award and notes together, the appellants were condemned in 837 days' delay at £20, or in a sum of £16,740, the result being that after some items in the appellants' favour had been deducted they were under the arbitration liable to the respondents in £7109 13*s.* 6*d.* under the Portsoy contract and in £5103 14*s.* 6*d.* under the Buckie contract, with interest from the 7th of November, 1887, till payment.

In his notes of his proposed findings the arbitrator also stated that he proposed finding the appellants entitled to certain miscellaneous items; and among those items under the Portsoy contract was a sum of £500 for "extra costs through insufficient drainage." As to this the arbitrator, being examined, said that in respect of "the drainage he allowed £500 to the contractors and that part of the six months' extention applied to that matter also, but that the £500 practically covered it."

The respondents intimated to the appellants that they did not intend to enforce payment of the sums decerned for in the name of liquidated compensation to an extent exceeding £11,490, being the amount to which they had restricted their original claim, and they offered to discharge their claims to the extent of £5250, being the amount awarded as compensation in excess of £11,490.

On the 3rd of January, 1888, the appellant raised this action

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for reduction of the awards. Of the points raised before the Lord Ordinary as foundation for the allegations that the arbitrator's awards were ultra vires and corrupt the following only were insisted in at the bar of the House :—

(3.) That the arbitrator was not entitled after the time specified for the completion of the works to extend the time for such completion. (5.) That the arbitrator had by his letter of the 9th of December, 1885, extended the time for completion of the works until the 15th of February, 1886, and that notwithstanding such extension of time he had awarded damages for the delay which had occurred and which by such extension had been condoned. (6.) Buckie section : The appellants averred that the bridge across the river Spey forming part of the Buckie railway was built under a contract with Messrs. Blaikie Brothers, dated January, 1883, in which Mr. H. B. Blyth was named arbitrator; that part of the appellants' contract with the respondents was to connect the bridge with the Buckie section by an embankment, but it was impossible to do this and so complete the Buckie section of the appellants' contract till the bridge was finished; that Messrs. Blackie had contracted to finish the bridge by the 31st of July, 1884, but they did not do so until May, 1886; that it was not until February, 1886, that the appellants were put in possession of the lands necessary for the formation of the aforesaid embankment, and that it was impossible for them to have completed the works until months after; that on the 20th of January, 1886, the respondents' resident engineer addressed a letter to the appellants stating that he expected the river Spey would be diverted in a week, and that he trusted they were making all the preparations necessary for filling in the banking required; that notwithstanding the arbitrator had by decree applicable to the Buckie contract found the appellants liable in £6800 in the name of liquidated damages, being at the rate of £20 per day for the period from the 30th of March, 1885, to the 1st of May, 1886, and that as if the bridge over the Spey had been completed by January, 1885.

The respondents denied that the completion of the works under the Buckie contract was retarded or materially affected by the state of the works of the Spey bridge; and further, they said that

any question of delay so arising was competently submitted to the decision of the arbitrator.

The Lord Ordinary (Lord Fraser), on the 3rd of November, 1888, held that there must be a partial reduction of the awards to the extent of £5250, being the amount awarded in excess of the respondents' claim, and therefore, ultra petita, but quoad ultra, his Lordship absolved the respondents from the conclusions of the action, and found that neither party was entitled to expenses.

On the 21st of June, 1889, the First Division of the Court adhered with costs (1).

1890. Nov. 27. The *Solicitor-General for Scotland* (Sir *Charles Pearson*, Q.C.), and *Law* (of the Scotch Bar), for the appellants :—

The awards must be set aside as ultra fines compromissi. In extending the time the arbitrator exceeded his jurisdiction, for the powers to extend the period of completion were conferred by the contracts, and were powers which could only be exercised during the progress of the works, and not afterwards. And whether a power to extend ex post facto was within his jurisdiction or not was for the Court to decide: *Caledonian Railway Company* v. *Greenock and Wemyss Railway Company* (2).

[LORD WATSON mentioned *Mackenzie* v. *Girvan* (3).]

The extension of time was not in the appellants' favour, because if the arbitrator had not extended the time, as having no power to do so, he might have taken a view more favourable to the appellants in the application of the compensation clause. The notes of the proposed findings of the awards being mentioned in the awards can be referred to: *Mackenzie* v. *Girvan* (3); *Glasgow City and District Railway Company* v. *Macgeorge, Cowan, & Galloway* (4); *Duke of Buccleuch* v. *Metropolitan Board of Works* (5). And it appears from those notes and the arbitrator's evidence that he awarded

(1) 16 Court Sess. Cas. 4th Series (Rettie) 843.

(2) 10 Court Sess. Cas. 3rd Series (Macph.) 892; on appeal, Law Rep. 2 H. L., Sc. 347.

(3) 1843, 2 Bells' Appeals, at p. 55.

(4) 13 Court Sess. Cas., 4th Series (Rettie) 609.

(5) Law Rep. 5 H. L. 418.

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to the appellant £500 for "insufficient drainage," which in the view of the arbitrator might have caused delay. If insufficient drainage did cause delay, then it was an inconsistency in the award to give damages over such period. Again, the arbitrator was wrong in treating the compensation as liquidated damages, and not as a penalty.

[LORD WATSON referred to *Lord Elphinstone* v. *Monkland Iron and Coal Company* (1).]

Secondly. The awards may be reduced on the ground of "corruption," within the meaning of sect. 25 of the Act of Regulations of 1695 (2). As regards the Buckie section, that contract forbade the appellants to form a certain portion of the embankment until the bridge over the Spey was completed. That was not done until May, 1886; and possession of the ground for the embankment was not given to the appellants until February, 1886; therefore it was impossible for the appellants, through the fault of the respondents, to complete the section sooner than they did. Yet damages against the appellants are given for that delay. There is no imputation of moral corruption on the part of the arbitrator; but an award can be reduced for "constructive" or "legal" corruption. In *Colquhoun* v. *Corbet* (3) Lord Thurlow is reported to have said that the award in that case "appeared so partial that it amounted to constructive corruption in the makers of it; and, therefore, it was reducible in terms of the Act of Regulations, 1695." In *Alexander* v. *Bridge of Allan Water Company* (4), Lord Deas said: "that which the law has stamped with the character of legal corruption may exist where the motives are perfectly pure, as no one can doubt was the case here." See also the interlocutor pronounced in that case (4).

[They also cited *Walker* v. *London and North Western Railway Company* (5).]

The Dean of Faculty (*Balfour*, Q.C.), and *Ferguson* (of the Scotch Bar), for the respondents, were not called upon.

(1) 11 App. Cas. 332.

(2) Given in Lord Watson's opinion, post, p. 44; see English statute, 9 & 10 Will. 3, c. 15.

(3) 1784, 2 Paton's App. 626.

(4) 7 Court Sess. Cas. 3rd Series (Macph.) at pp. 498, 503.

(5) 1 C. P. D. 518.

LORD HALSBURY, L.C.:—

My Lords, I confess it appears to me that this is a very plain case. I do not at present assent to the view in the direct form in which is has been alleged (1) that the law of Scotland applicable to this case is different from the law of England. There is no doubt that at one time the Courts in both countries treated themselves rather as being in the position of Courts of Appeal, and examined whether or not the conclusion at which an arbitrator had arrived was sound, both in point of law and in point of fact. I think the only learned judge who ever gave distinct expression to that view was Lord Thurlow, and I am the more desirous of alluding to him and doing him justice, because I think that what Lord Thurlow says, in *Knox* v. *Symmonds* (2), rather throws some doubt upon the question whether he ever was responsible for the statement put into his mouth in the case which has been quoted at the bar (3). Lord Thurlow says that it is no ground for setting aside an award that the conclusion was wrong, otherwise it would be a ground for setting aside all awards; but his Lordship then goes on to say that, where certain facts are submitted to an arbitrator by the Court, the arbitrator must be considered to be somewhat in the position of a master; and that the Court, when the matter comes back to them, have to consider, not only whether the master has acted according to law, but whether he has arrived at a sound conclusion. His Lordship goes on to distinguish arbitrations in the more popular sense of the word, and shews that where there are real arbitrations, and where the parties have selected their judge, in such cases you have to shew a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the Court can interfere with his award. And in the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words,

(1) See Lord Campbell in *Mackenzie* v. *Girvan*, 1843, 2 Bells' Appeals, at p. 55.

(2) 1 Ves. Jun. 369.

(3) *Colquhoun* v. *Corbet*, 1784, 2 Paton's App. 626.

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erroneous in deciding upon a question of law on demurrer, nevertheless held that the parties, having submitted that question to the arbitrator, it was for the arbitrator to determine it; in their own language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts (1). In the Court of Queen's Bench, thirty years ago, that decision was adopted as being the law which would guide the Court in the decision of such questions.

My Lords, upon the facts now before your Lordships everything appears to have been practically abandoned except the third objection, referred to by the Lord Ordinary, and the sixth. Now, with regard to the third objection, the difficulty seems to me to arise upon the perhaps not very well conceived or selected words of the contract. That the parties by that contract intended that the arbitrator should have the power of determining between the parties whether or not liquidated damages (I assume now that what are called the penalties are liquidated damages) should be ascertained by the arbitrator with reference to the conduct of both parties, is manifest; and the language which is used undoubtedly primâ facie (for my own part, I am prepared to admit as much as that) rather looks like an intention by the parties that that determination by the arbitrator should go on during the currency of the contract; that he should be the consulting engineer; that he should be the person to whom application should be made in the event of alleged default on the one side or the other; but I am by no means prepared to assent to the conclusion that that excludes the consideration of such questions afterwards. Having regard to the documents before us, it is almost impossible to suppose that the parties did understand that, when the arbitrator was investigating the question what damages were to be reported, he was not to have regard to the conduct of both parties, and that, if one party had withheld the possession of the land, that party was not to insist upon the delay consequential upon his action as being one of the elements of the case in respect of which he could claim damages. It is impossible, I think, to read the words of the contract without seeing that that which was in itself a very sensible provision, was the intention of both

(1) *Stimpson* v. *Emmerson*, June 5, 1847, 9 L. T. 199.

parties. And in truth, my Lords, I cannot entertain a doubt that, whether that provision were held to be there or not, when it was left to the arbitrator to decide in respect of the delay which had taken place, apart from any such provision in the contract at all, it would have been perfectly competent for the arbitrator to say: "I shall not allow this or that period of delay to be made the subject of damages against the contractor when it is proved before me, as a matter of fact, that the delay which then existed was caused by the act of the railway company themselves, who were bound to provide either facilities, or material, or land, or what not, and that the delay which has taken place was not the fault of the contractor." That is manifestly the law in this country, and I believe it to be the law also in Scotland. Therefore, that part of the award, both upon the construction of the language itself and upon the substance of the matter, apart from the language, seems to me to be free from objection.

My Lords, with reference to that question, which alone appears to have invited comment by the learned judges, I confess I am a little puzzled. The thing in itself does not speak for itself as though the award shewed that the damages were awarded by reason of the bridge not being completed, and that nevertheless, although the bridge was not completed, the portion, or any particular portion, of the works was not completed by reason of the prohibition contained in the contract to do it until the bridge was completed. In order to make the argument intelligible and sensible, and in order to arrive at the conclusion of repugnancy and unreasonableness insisted upon, I must know what the facts were. I do not know what the facts were; but the arbitrator did. I am not to assume that he was so unreasonable as to award damages in respect of a thing which was caused by the non-completion of the bridge. On the contrary, until I am compelled to come to the opposite conclusion upon the face of the award, or upon some evidence which is legitimately to be brought into the consideration of the matter, so that I can form a judgment upon it, I shall assume that the arbitrator performed his duty; and if he did perform his duty, it would be unreasonable and absurd to give damages for anything in respect of which the company themselves were really responsible. And how does it

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appear that he has done anything of the sort? I am totally unable to understand that. Some of the learned judges appear to have adopted the view that the arbitrator must have awarded damages in respect of that which had not been completed by reason of the absence of the bridge. I myself have been looking at these documents carefully, and I am unable to come to any such conclusion. One learned judge, Lord Shand, says in his judgment: "I should have been clearly of opinion that the meaning of the contract would not justify the award that he has given." If the learned judge means by that that the contract never intended that damages should be given in respect of the non-completion of that the non-completion of which was due to the conduct of the company, I entirely agree with him; but there, as it appears to me, the fact fails. I can find no such fact as would induce me to come to the conclusion that the arbitrator has ever awarded any damages in respect of any default caused by that. Damages are awarded in respect of the delay in the completion of the whole contract, and it is extremely possible that the mere fact that the bridge was not completed was as irrelevant to the culpability of the party causing that delay as any other fact which can be imagined.

Under these circumstances, it appears to me that this award is perfectly good upon the face of it. There is no evidence that I can find leading to the conclusion that the arbitrator has exceeded his jurisdiction, either in the way of leaving out what he was bound to attend to, or of inserting or considering anything which he had no jurisdiction to adjudicate upon. I am, therefore, of opinion that the award cannot be attacked upon those grounds.

With reference to the other ground, namely, corruption, which is alleged to evade the operation of the statute, corruption, in the ordinary and popular sense of the word, is entirely repudiated by the learned counsel at the bar. It is said that what it does amount to is constructive corruption. Whether there be such a thing or not, I am not at all prepared to say. I can only say with reference to the case which was quoted, the *Bridge of Allan Waterworks Case* (1), that that case stands by itself. If it ever comes for review before this House, or any case which raises such

(1) 7 Court Sess. Cas. 3rd Series (Macph.) 492.

a question, I shall be prepared to express my opinion upon it. At present I can only say that the facts of that case would have entirely justified the decision, upon the ground that the arbitrator had exceeded his jurisdiction, and, therefore, was not exercising the function which had been given to him by statute. If it is placed upon the other ground (and I am bound to say that the interlocutor pronounced does in fact expressly refer to legal corruption), it is possible that a case raising the point may come for review before this House. All I can say at present is, that I am certainly not prepared to assent to that view when the decision itself is, upon the grounds which I have indicated, perfectly sound.

My Lords, under these circumstances, considering that the case rests on familiar principles with which we are well acquainted, and that the points are really simple ones when the matter has been explained, I am only surprised that your Lordships' time should have been occupied at any length in dealing with it; and I move your Lordships that this appeal be dismissed with costs.

LORD WATSON:—

My Lords, I am of the same opinion. The points raised by the appellants in this case have all been decided against them by the unanimous judgment of five learned judges in the Court below for reasons some of which at least appear to me not to admit of serious controversy. The parties committed to the arbiter, whom they selected, the right to construe the contract between them, the right to determine all questions of fact arising between them in relation to the contract, and the right to determine the application of the law to these matters of fact.

The two points insisted on at the bar of the House were the third and the sixth objections. Now, as regards these matters, they both appear to me to involve the construction of the contract, that being a matter specially committed to the arbiter by the express terms of the submission. I do not think that any good cause has been shewn against the finding of the arbiter under the third head. On the contrary, my present impression is that the arbiter determined according to the true meaning of the contract between the parties.

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Then, as regards the sixth objection, I do not concur in the expression of opinion which fell from two learned members of the Court below upon the character of the finding pronounced by the arbiter. It does not appear how the arbiter construed that particular clause of the contract which the sixth objection involves; but, assuming that he construed it in favour of the appellants in this case, the question is not, in my opinion, one of construction merely; it is a question arising upon the facts of the case, and these facts have not been fully brought before the House. I do not complain of that, because I doubt the competency of submitting them to the House; but the conclusion to which I have come is, that there are many possible states of fact in regard to the completion of these works, and want of energy shewn by the contractors in pushing them to completion, which would warrant the finding of the arbiter upon a construction of the contract favourable to the appellants.

These are sufficient grounds for disposing of the argument which we have heard; but I may be permitted to make a single observation upon that clause of the Regulations of 1695, which was referred to in argument. I need scarcely remind the House that these Regulations are of statutory force. They were enacted by Commissioners under the special sanction of an Act of Parliament. They have sometimes been referred to as an Act of Sederunt, because under the King's Royal Warrant they were directed to be ingrossed in the Sederunt Book of the Court of Session at the time. The object, as I take it, of the Regulation made by the Commissioners was this—to put an end to the practice, which until that date had obtained in the Court of Session, of treating the awards of arbiters as reviewable decisions, and of setting them aside whenever, in the opinion of the Court, upon an examination of the evidence and the proceedings before the arbiter, the conclusion at which the chosen judge of the parties had arrived was either contrary to law or contrary to fact. The rule laid down is in these terms: "That in time coming the Lords of Session sustain no reduction of any decreet arbitral that shall be pronounced hereafter upon a prescribed submission at the instance of either of the parties submitters upon any cause or reason whatsoever, unless that of corruption, bribery, or

falsehood, to be alleged against the judges' arbitrators who pronounced the same." The three grounds are "corruption," "bribery," and "falsehood"—not "corruption in the decreet arbitral"—the expression which I find in the closed record, but "corruption," "bribery," or "falsehood" brought home to the individual judge.

It has been recognised by the Court of Session, and also by noble Lords in this House, that the regulation was never intended to go beyond the point of putting an end to the practice of review upon the merits, and of placing the award of an arbiter selected by the parties for the determination of all questions between them, on precisely the same footing as the decree of a Judge Ordinary, to whose decisions finality has been attached by statute. Accordingly, both in this House and in the Court of Session, awards have been set aside upon other grounds, which did not necessarily involve an investigation of the merits of the case. Want of jurisdiction is not covered by it—it is not one of the pleas which are forbidden, and an award may still be set aside on that account. Misconduct in the course of the case, whether in the proceedings which led to the award or in the award itself, is another ground with which this Regulation was never intended to deal. I think I state the law correctly when I say that it will be a good ground of reduction at the instance of either party, if he is able to shew independently of the Regulation either that the arbiter has exceeded what are called in Scotland the fines compromissi, or that in the course of the arbitration he has disregarded any one of the express conditions contained in the contract of submission, or any one of those important conditions which the law implies in every submission. The case of Sharpe (1) in 1817, to which I alluded in the course of the argument, is a good illustration of that. Lord Eldon there refused to recognise an award as valid, where the arbiter was perfectly honest—free from corruption, free from bribery, and free from falsehood—but had proceeded upon an honest error believing that he had a joint representation from both the parties to the submission, whereas it was a representation from one only. And so in those cases where an act innocently

(1) *Sharpe* v. *Bickerdyke*, 3 Dow. 102.

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committed by the arbiter amounts to misconduct which, in the opinion of the Court, would naturally imply that justice had not been done between the parties, the award must be set aside, not according to the Regulation, but according to those principles of law which existed before the Regulation, and which were not in the least affected by it.

I feel bound to protest against the view expressed by some of the Scotch judges in the cases to which we have been referred at the Bar, with regard to what they call "constructive corruption." I suppose that as well as "constructive corruption" you may have "constructive bribery" and "constructive falsehood." The meaning of it appears to be this: that in order to satisfy the ends of justice in dealing with the validity of an award, it is necessary to invoke this constructive principle of which I have under all circumstances the greatest distrust; and that for the purpose of doing justice it is necessary to call a man "corrupt" who is not corrupt but honest, to call a man "bribed" who never listened to an improper suggestion from any quarter, to call a man "false" who never uttered a falsehood. I do not doubt that corruption might be inferred from the terms of an award; and it is clear that, if Lord Thurlow used the expression "constructive corruption" in *Colquhoun* v. *Corbet*, he must have used it in that sense. Even in that case the term is inappropriate, because such corruption is actual and not constructive.

But, my Lords, if you examine those cases to which we have been referred, I think it will be found that in every one of them the ground of reduction which was dignified with the name of "constructive corruption" fell within the category of cases which, as I have already explained, are entirely outside the regulation. Take the case of *Alexander* (1), which involved two points, and two points only. The first of these was whether the arbiter had committed an excess of jurisdiction by declining to entertain a claim which was laid before him in a statutory submission under the Lands Clauses Act, and which he had no power to reject. He found that the claimant was not the owner of part of the subject possessed by him and his tenants, and upon that ground alone he, having no competency whatever to deal with

(1) 7 Court Sess. Cas. 3rd Series (Macph.) 492.

questions of property, having only the duty of valuing that which was submitted to him, refused to value it. The second point was that he, mistaking his duty, but in perfect honesty (for nothing else was imputed to him by the learned judges who decided the case and set aside the award), purposely declined to put into the award a description of the subjects which he had valued, so that the omission which he had made might not appear. He did that because he thought it right; he thought he had valued all he was bound to value, and he said: "I will only put in a general description." The Court held that he had failed to do his duty under the Lands Clauses Act, although there was no imputation upon his honesty. But I see no reason whatever for calling that "constructive corruption."

In many other cases the same thing occurred. In the case of *Mitchell* (1), which is perhaps the leading case in the Court below upon this branch of the law, the arbiter thought that he was bound to conclude the case without further proof from the parties; the consequence of which was that one of them who had taken the precaution of obtaining a commission for the purpose of taking evidence abroad, had no evidence to offer, because, from no fault of his, the commission had not been executed. Under these circumstances the arbiter had proceeded upon evidence from one side only. The Court held that it was his clear duty to give an opportunity to the opposite side of bringing evidence before him, and accordingly that he had violated the principles of justice, and that justice could not be done between the parties without setting aside his award.

My Lords, these are all the observations which appear to me to be necessary for the decision of the case. It humbly appears to me that the case stated at the bar for the appellants fails, inasmuch as neither the Act of Regulations nor any one of the decisions without the Act entitles them to have the award set aside. I therefore concur in the judgment which has been moved.

LORD BRAMWELL:—

My Lords, I am entirely of the same opinion, and I desire to express my hearty concurrence in what has been said by my

(1) 10 Court Sess. Cas. Series (Dunlop) 1297.

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noble and learned friend opposite (Lord Watson) about "constructive corruption." I think that that and similar expressions are only used by persons who have a desire to bring about a certain result, and do not know how to do so by the use of ordinary and intelligible expressions.

I just wish to make one other remark. I do not believe that this case would have found its way here but for the magnitude of the stake.

LORDS HERSCHELL and MORRIS concurred.

Judgment appealed from affirmed; and the appeal dismissed with costs.

Lords' Journals, November 27, 1890.

Agent for appellants: *Andrew Beveridge, for Alexander Campbell, S.S.C., Edinburgh.*

Agents for respondents: *Dyson & Co., for T. J. Gordon & Falconer, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1890 *Dec.* 1.

HUGH HOGARTH AND OTHERS (OWNERS OF "WESTFALIA") . . . . . } APPELLANTS;

AND

ALEXANDER MILLER, BROTHER, & CO. RESPONDENTS.

Ship—Charterparty—Payment of Hire to cease until Ship in an efficient state to resume Service—Payment during discharge of Cargo—Costs.

By charterparty between the appellants and the respondents, it was agreed, that the respondents should hire the appellants' steamship for the purpose of a voyage or voyages within certain limits at "8*s.* per gross registered ton per calendar month"—hire to continue until her re-delivery to the appellants (unless lost) at a safe port in the United Kingdom or on the Continent, &c. By the charterparty it was stipulated that the appellants should provide and pay for the provisions and wages of the captain and crew, and maintain the ship in a thoroughly efficient state in hull and machinery for the service; and that "in the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the vessel was stopped for more than

forty-eight consecutive hours, the payment of hire should cease until she should be again in an efficient state to resume her service." While the vessel was on a voyage to Harburg, under the charterparty, her high-pressure engine broke down, and it was found necessary to put back to the port of Las Palmas. As repairs could not be effected in that port, the appellants and respondents agreed that a tug should be employed to tow the ship to Harburg, and that the expense, £1100, should be treated as general average on cargo, ship, and freight. As their proportion of this expense the respondents eventually paid £867. The ship left Las Palmas on the 18th of October, 1887, towed by the tug, and assisted by her own low-pressure engine; and arrived at Harburg on the 31st of October. By the 10th of November the cargo intended for that port was discharged, the ship's steam winches being available. On the same day the repairs to the ship's navigating machinery were completed, and the voyage continued:—

Held, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series (Rettie) 599), (Lord Bramwell, dissenting), that the appellants had no claim for hire for the voyage from Las Palmas to Harburg, the ship not being independently efficient for that purpose.

But, *held*, varying the decision of the Court of Session (Lord Morris dissenting), that the appellants were entitled to payment of hire for the full time actually occupied in discharging the cargo at Harburg, the ship being in an efficient state for that particular employment.

APPEAL from a judgment of the Second Division of the Court of Session, Scotland (1).

The appellants, Hugh Hogarth and others, were the owners of the *Westfalia*, a steamship of 1135 tons gross register. The respondents, Messrs. Alexander Miller, Brother, & Co., were the charterers of the said ship, and also the cargo owners. By the charterparty, dated the 26th of February, 1887, the respondents hired the ship "to be by them employed in carrying lawful and non-injurious merchandise between such ports within the following limits, viz., Swansea $\frac{\text{and}}{\text{or}}$ Rotterdam, or other ports in the United Kingdom or on the Continent, to such safe ports on the West Coast of Africa as charterers direct and back to Europe." The respondents to pay for the hire of the vessel at the rate of 8*s*. per gross register ton per calendar month, and at the same rate for any part of a month: hire to continue until her re-delivery to the appellants (unless lost) at a safe port in the United Kingdom or on the Continent (between Havre and Hamburg inclusive); and also for all coal, port charges, and expenses of loading or unloading. The appellants were to

(1) 16 Court Sess. Cas. 4th Series (Rettie) 599.

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supply and pay the crew, the ship's insurance, for all ship stores, and were to maintain the ship "in a thoroughly efficient state in hull and machinery for the service."

The charterparty also provided: "In the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service."

On the 30th of September, 1887, in the course of a voyage from the West Coast of Africa to Harburg on the Elbe, and at a point ninety-six miles from Las Palmas, in the Canary Islands, the ship's high-pressure engine broke down. The captain put back to Las Palmas, her low-pressure engine working part of the way. The ship could not steam astern. Surveyors at Las Palmas reported that the ship was not in a seaworthy condition, and they refused to certify her as fit to proceed to her destination with her low-pressure engine alone. As it was impracticable to repair the ship at Las Palmas, on account of there being no engineering works there, it was agreed between the appellants and respondents—the cargo underwriters in effect authorizing it—that the ship should be towed home by a tug sent out from England, the expense, 1100*l.*, to be treated as general average over cargo, ship, and freight. On the 18th of October the ship started from Las Palmas, towed by the tug, and with her low-pressure engine aiding. On the 31st of October she reached Harburg. On the 1st of November the respondents commenced to discharge the cargo intended for that port, the ship's steam winches and machinery being efficient for that purpose. Repairs to the high-pressure engine were also proceeded with. On the 10th of November the discharging was completed, and the repairs were finished on the same day. On the 11th of November the ship was examined by Lloyds, and left Harburg with the remainder of the cargo for Antwerp. The respondents alleged that the discharge might have been completed much sooner, but their servants did not hurry it, as they knew the vessel could not leave until the repairs were finished.

An average adjuster at Harburg settled the respondents' pro-

portion of the expense of bringing home the ship and cargo at £867 9*s.* 11*d.*; and this sum they paid, it being alleged by the appellants that the same amount was repaid to the respondents by their underwriters.

The appellants brought this action to recover £341 4*s.* 8*d.*, as hire of the ship from the 18th of October to the 10th of November; or, in the alternative, as the sum due in respect of the service rendered by the ship to the respondents on and after the 18th of October. The respondents disputed any liability for the period in question. At the hearing of the pursuers' proof before the Lord Ordinary (Lord Trayner), a suggestion was made by Mr. Hogarth, one of the appellants, that an alleged understanding had been come to between him and Mr. Miller, one of the respondents, that the ship's hire for the passage home was to be taken upon the average of her former performances. Counsel for the respondents, who tendered no parol evidence, then offered to bring Mr. Miller to contradict this evidence; but the pleadings being confined to a claim upon the charterparty, and containing no reference to any other agreement to pay hire, the Lord Ordinary said he should disregard that portion of the proof.

The Lord Ordinary, on the 31st of October, 1888, held the appellants entitled to £320, being the sum sued for, less £21 4*s.* 8*d.*, the ship's hire for a day and a half, which was the excess over the average duration of a voyage by the *Westfalia* from Las Palmas to Harburg. The Lord Ordinary based his decision mainly on the ground that during the period in question the ship was in fact engaged in carrying and delivering cargo, thereby rendering to the respondents the services contemplated by the charterparty. He also was of opinion that the arrangement as to the cost of towage did not relieve the respondents from their liability to pay hire.

On the 15th of March, 1889 (1), the Second Division of the Court of Session recalled the Lord Ordinary's judgment; found for the appellants for £60 as an average period for discharge, and quoad ultra assoilzied the respondents, and found the appellants liable in expenses. Their Lordships considered that during the time the ship was on the voyage from Las Palmas to

(1) 16 Court Sess. Cas. 4th Series (Rettie) 599.

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Harburg she was not in a seaworthy condition, and was broken down and inefficient within the meaning of the charterparty; and that, consequently, no hire was payable for this period. They considered (Lord Young doubting) that while at Harburg the vessel was efficient for the purpose of discharging, but as the engines were being repaired, that hire should only be paid for the time within which the discharge might reasonably have been effected, namely, four days.

On appeal.

1890. Nov. 27, 28, Dec. 1. *Finlay*, Q.C., and *D. C. Leck*, for the appellants:—

The meaning of the word "efficient" in the contract must be taken to be that the ship was to be efficient or fit to complete the service without time being lost; and a ship which became efficient by the use of one engine inside and the supply of another outside in a tug fulfilled the contract. Had the ship in her disabled condition been picked up by another ship and so brought home, not only the hire would have been payable, but also the freight due for carriage of merchandise in the vessel. At all events, the respondents have had the use of the ship to carry or warehouse their goods, and a reasonable allowance is due in respect of such benefit.

Secondly, the appellants are entitled to hire for the whole time the ship was unloading, it being a service for which she and her machinery were quite efficient.

J. Gorell Barnes, Q.C., and *F. W. Hollams*, for the respondents, were asked to confine their argument to the claim for hire in respect of the period of discharge:—

A cesser of the right to hire having commenced, there could not be a resumption of such right until the ship had been repaired and again efficient to perform every function she might be called upon to perform. The expression, "efficient to resume her service," must be taken to mean total and absolute efficiency. The ship could not be said to be efficient during the period of unloading, when the service required of her was not merely to be

at Harburg, but to be able to put to sea at the order of the respondents.

At all events it was known that the ship had to be repaired, and therefore the discharge was not hurried; and more than the usual time was taken; but the ship being at Harburg partly for repairs and partly for discharge, the respondents ought only to be liable for what was a fair time for discharge: *Marine Insurance Company* v. *China Transpacific Steamship Company* (1).

As to costs, a slight variance of the judgment of the Court of Session in favour of the appellants gives them no right to costs: *Westminster Fire Office* v. *Glasgow Provident Investment Society* (2).

Finlay, Q.C., in reply:—

As to costs, if the ten days at Harburg are allowed to the appellants, they obtain one-half of the whole sum claimed.

LORD HALSBURY, L.C.:—

My Lords, the whole of this case, as it appears to me, turns upon the true construction of the contract which regulates the relations between the parties, and there are two very diverse views which have been presented to your Lordships upon the true construction of the language of that instrument. I think that each part of the contract must be looked at with care, and that it must be remembered that in the construction of the contract we are not bound simply by the exact words. We must remember that it is a mercantile contract, and we must remember the nature of the subject-matter with respect to which each of the parties was contracting.

Now, the contract is for the hire of a ship, and each of the parties must be taken to know what are, in the ordinary course, the duties to be performed by a ship, and it must be taken that each party is contemplating the possibility of the benefit which he is contracting to obtain being interrupted by various causes. That clause of the contract which has to be interpreted is in these terms, and each part of it, I should say, ought to be looked at with care and with reference to the words which are found associated with it in the particular instrument which we have to

(1) 11 App. Cas. 573. (2) 13 App. Cas. at p. 715.

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construe. It is, "That in the event of loss of time." That is the leading and guiding principle by which we are to ascertain what it is with reference to which the succeeding words are used. What the hirer of the ship is guarding against by this contract with the owner of the ship is, that he is not to pay during such period of time as he shall lose (that is, lose time) in the use of the ship by reason of any of the contingencies which this particular clause contemplates. "That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours." The language is consonant with what I have indicated to be the general intention of the parties in entering into this part of the contract. In the first place, it is "in the event of loss of time," and then the parties proceed to shew that that contingency which is to give rise to the actual operation of the clause is, that the working powers of the vessel are interfered with, and "the working of the vessel is stopped for more than forty-eight consecutive working hours," and upon that there is to be a cessor. What the parties to this contract contemplated was this: The hirer of the vessel wants to use the vessel for the purpose of his adventure, and he is contemplating the possibility that by some of the causes indicated in the clause itself, namely, "the deficiency of men or stores, breakdown of machinery, want of repairs or damage," the efficient working of the vessel may be stopped, and so loss of time may be incurred; and he protects himself by saying, that during such period as the working of the vessel is stopped for more than forty-eight consecutive hours, payment shall cease; and now come the words upon which such reliance is placed: "until she be again in an efficient state to resume her service." If the contention which has been put forward at your Lordships' Bar were well founded one might have expected that the parties in contemplating what upon that view was said to be the intention of the parties if they had intended that the test should be the efficient state of the vessel as it originally was might very readily have used the words, "until such time as the deficiency of men or stores has been removed, or the breakdown of the machinery has been set

to rights, or the want of repairs has been supplied, or the damage has been remedied," and so forth; or the terms might have been inserted that the resumption of the payment shall be dependent upon the vessel being restored to full efficiency in all respects, as to seaworthiness and otherwise, as she was at the time when she was originally handed over. But the parties have not used such language. On the contrary, the test by which the payment for the hire is to be resumed is the efficient state of the vessel to resume her service; so that each of those words, as it appears to me, has relation to that which both of the parties must be taken to have well understood, namely, the purpose for which the vessel was hired, the nature of the service to be performed by the vessel, and the efficiency of the vessel to perform such service as should be required of her in the course of the voyage.

As to the first part of the claim which has been insisted upon here, I confess that I entertain no doubt whatever that the vessel was not efficient in any sense for the prosecution of her voyage from Las Palmas to Harburg. I decline altogether to enter into the question of the contracts of insurance, with which these parties have nothing to do — I mean, have nothing to do with respect to the performance or the construction of this contract. This contract must receive the same construction whether the vessel was insured or not, and the question what other rights might have been obtained by the shipowner by supplying that which by the hypothesis he did not supply, is a question which is not before your Lordships, and upon which, at all events, I decline to express any opinion. As a matter of fact, this vessel did not and could not pursue her voyage as a vessel from Las Palmas to Harburg. That another vessel took her in tow, that another vessel accomplished the voyage and brought this vessel, not as an efficient steamer, but as a floating barge, whereby the goods were brought to Harburg, seems to me to be nothing to the purpose. I use that phrase because, although I am aware that it is suggested that the low-pressure engine was used for the purpose of easing the work of the tug, that appears to me to be entirely irrelevant when one is ascertaining whether this vessel of its own independent power was efficient for the purpose of prosecuting the voyage. All that is

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suggested is that the tug was assisted by the use of the low-pressure engine. I find, as a matter of evidence, as each Court I think has found, that the vessel was not seaworthy for the purpose of accomplishing her voyage without the assistance of a tug; she did not accomplish her voyage without the assistance of a tug; and in truth, as it appears to me, upon these facts it is clear that the voyage which was accomplished, and the service which it was contemplated this hired vessel was to perform, was performed by another vessel, and that the auxiliary assistance which she gave to that other vessel was not making the vessel herself an efficient vessel for the working of which the hirer was to pay.

It appears to me that the various hypotheses which have been put dispose of this part of the case, because the greater or less degree of efficiency of the vessel which these hypotheses have suggested appears to imply in all cases this admission, that without the additional assistance the vessel could not have accomplished that object which both the shipowner and the hirer had contemplated as being that which was to be supplied by the shipowner to the hirer. If so, how can it be said in any business sense, apart from the mere words, that the vessel was "in an efficient state to resume her service"? That being once admitted as a question of fact (and if it were not admitted I certainly should find that upon the evidence) it appears to me that she was not herself seaworthy or efficient to perform the voyage, and did not herself perform the voyage. That is conclusive upon the first part of the case, and therefore no payment for the hire was due during the period that she was passing from Las Palmas to Harburg.

With reference to the second question which has been argued it appears to me that one has again to refer to each of these clauses of the contract to see what the parties were bargaining for. I should read the contract as meaning this, which I think one of the noble and learned Lords suggested in the course of the argument, that she should be efficient to do what she was required to do when she was called upon to do it and accordingly, at each period, if what was required of her was to lie at anchor, if it was to lie alongside the wharf, upon each

of those occasions, if she was efficient to do it at that time she would then become, in the language of the contract, to my mind "efficient," reading with it the other words, "for the working of the vessel." How does a vessel work when she is lying alongside a wharf to discharge her cargo? She has machinery there for the purpose. It is not only that she has the goods in the hold, but she has machinery there for the purpose of discharging the cargo. It is not denied that during the period that she was lying at Harburg there was that machinery at work enabling the hirer to do quickly all that this particular portion of her employment required to be done. It appears to me, therefore, that at that period there was a right in the shipowner to demand payment of the hire, because at that time his vessel was efficiently working; the working of the vessel was proceeding as efficiently as it could with reference to the particular employment demanded of her at the time.

Under these circumstances, it appears to me that the pursuer here was entitled to payment for the hire of the vessel during the period of discharge. That would make the pursuer entitled, I think, to a sum of 136*l.* 4*s.*, and for that I think judgment should be entered.

My Lords, I wish to say one word as to the other view which has been presented, that the shipowner was not entitled to anything in respect of the period during which she was discharging. It has been put in various forms by the learned counsel. What reason or good sense would there be in construing a mercantile contract so that all right for payment should cease when the other party to the contract was getting everything he could out of the use of the vessel if the vessel was in an efficient state? I can see none. And what was put this morning seems to me conclusive: if some other part of the steam-gearing not used for the purpose of navigation had gone out of working in mid-ocean, and there had been no longer any use for that particular thing, the reason why such a breakdown of the machinery in mid-ocean would not have created a cessor of payment under the contract would, I suppose, have been this—it would have been argued, and argued justly, "It is very true that there has been a breakdown of machinery; but that breakdown of machinery is

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not the only event contemplated; it does not of itself entitle you to a cessor of payment. There must be to entitle you to a cessor of payment a loss of time arising from a breakdown of machinery. Not even then does the cessor of payment arise; but there must be a loss of time by the breakdown of the machinery whereby the working of the vessel is stopped for the contracted time." That appears to me to reflect great light upon the other question—What was the breakdown of the machinery which was contemptated by both the parties? It appears to me that the resumption of the right of payment is correlative with that; and inasmuch as when the vessel got to Harburg the vessel became "efficient" for the purpose for which alone she was wanted at that time, it appears to me that the right of payment arose.

Now, under ordinary circumstances, when a substantial claim has been established, having been successfully prosecuted at your Lordships' bar by the pursuer or plaintiff, the result is that he shall be entitled to costs; but in this case, certainly, there are difficulties in either view of this question. For my own part, it seems to me that both parties have been insisting on rights which they did not possess. The pursuer has insisted upon a right to payment during the whole period of the voyage from Las Palmas to Harburg, which I submit to your Lordships he is not entitled to. On the other hand, the charterer, the defender, has been insisting from the first that he was not bound to pay anything in respect of the period of discharge, when the owner of the vessel was, according to the view I have presented to your Lordships, entitled to the hire of the vessel. The result of that appears to me to be that both parties have been in the wrong, and both parties have been insisting upon an affirmative case. It does not seem to me to be like the ordinary case in which the plaintiff has merely claimed too much, and has failed in proof as to some of it. It appears to be rather in the nature of two separate claims, each of the parties failing to make out one of those claims. Under those circumstances, while I move your Lordships that the interlocutor be amended by entitling the pursuer to judgment for £136 4*s.*, on the other hand it appears to me that the course of litigation has been such, that neither of the parties is in a position to ask for

costs. I therefore move your Lordships that the costs both here and below, from the original rise of this litigation to the present moment, shall not be given to either of the parties, but that each of them shall pay their own costs.

LORD WATSON:—

My Lords, if the appellants were suing for freight in respect of cargo which had been safely carried to its destination, notwithstanding the unseaworthiness of the ship, that consideration might have gone a long way in their favour. Such is not the nature of the claim which they prefer. They hired their ship and the services of its crew for an all-round voyage from this country to the West Coast of Africa, and thence to a home port or a port on the Continent. Hire is payable according to a monthly rate, subject to a special stipulation, which provides, in the first place, that the shipowner shall maintain the hull and machinery throughout in a thoroughly efficient condition, and, in the second place, that under certain circumstances payment of hire shall cease.

The high-pressure engine of the vessel broke down on her way home from Africa, and in consequence she put into the port of Las Palmas, which she reached with the aid of her low-pressure engine assisted by her sails. The parties seem to be agreed that the condition of the vessel upon her arrival there brought her within the condition of the contract as to cesser of hire. Loss of time was incurred through the breakdown of the machinery, and the vessel was stopped for more than forty-eight hours, having been detained by the cause I have mentioned, before she ultimately sailed, from the 1st to the 18th of October. The appellants do not claim hire for that period. Whilst the vessel lay at Las Palmas, it was found not to be expedient to repair her at that port, from want of workmen and want of materials, and accordingly an arrangement was entered into of the details of which we know nothing beyond this, that the parties, hirers and charterers, agreed to bring her to Harburg, which was her first port of destination, at their joint expense, by means of a tug, and that the cost of bringing her should be defrayed by them on the same footing as if it had been general average loss.

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Accordingly, the vessel sailed under tow of a tug, and reached Harburg on the 1st of November, almost in due course.

The first question which arises is this: Was the vessel, when she started under tow for Harburg, in an efficient state to resume her service within the meaning of the contract? I have no hesitation in answering that question in the negative. The service contemplated was a service to be performed by the vessel without foreign aid, the means of propulsion through the water being her own machinery. But the fact is, that she did not proceed from Las Palmas to Harburg in that condition; she was towed; and I think that is quite sufficient to bring the whole period from her leaving Las Palmas till she reached the pier at Harburg within the terms of the condition I have referred to, and that no hire is due for that period.

It was suggested in the course of the argument, that a reasonable allowance was due from the charterers in respect of the amount of use which they undoubtedly had, because their cargo was conveyed to the port of destination, and safely conveyed, in a hull which was the property of the shipowner. They had undoubtedly that use, and they had besides, to some extent, the aid during the voyage of steam power supplied by the ship owner.

I do not mean to cast any doubt upon the suggestion that there may be circumstances, which, as matter of commercial expediency or as matter of equity, may justify the conclusion, that where a contract payment has ceased there may, notwithstanding, be a quantum meruit due to the shipowner; but in all such cases it must be of the nature of a reasonable payment, warranted by the circumstances, in exchange for a use from which the charterer has benefited. But what are the facts here? If the shipowner had chosen to pay for a tug to tow the steamer to Harburg, and had thereby supplied at his own cost an equivalent for an efficient vessel, which his was not at the time, it may be that that would have been considered (I think it might fairly have been considered) by the Court as so substantial an equivalent for the stipulations of the contract which he had violated that he was entitled to recover hire for that period. But that equivalent was not in this case given by the shipowner—it was

paid for to the extent of £860 odd by the charterers, the balance of the hire of the tug, to the amount of some £230, being borne by the shipowner. If the shipowner had at his own cost paid for the tug, he would have expended about £800 more than the hire he would have earned. On the other hand, under the arrangement which was entered into and was acted upon, the charterers have paid considerably more than double the hire which they stipulated to pay for an efficient vessel in terms of the contract. In that state of facts, I cannot find any consideration which points to the propriety of making an allowance by way of quantum meruit to the appellants; and, therefore, I have come to the conclusion that upon this first branch of the case the judgment of the Court below is well founded.

In regard to the second branch of the case, the claim for hire whilst the vessel was under discharge at Harburg, I have come to a different conclusion, because it appears to me, for the reasons which have been already indicated by the Lord Chancellor, that from the moment when she reached the pier at Harburg the vessel was in an efficient state to perform that part of the contract work for which she was hired, and for which she was in the possession of the respondents. Her steam-winches were in perfect order, and it humbly appears to me, that if charterers keep possession of a vessel which is in a thoroughly efficient state for all the purposes contemplated at the time by the contract, and required by them, they must, in terms of the contract, pay the stipulated hire. No doubt, on the record, there is a statement made by the respondents to the effect that the discharge of the cargo proceeded leisurely, and that it was known to the defenders and their agents that the repairs would last for a considerable time. I venture to doubt whether that statement if admitted would afford a good answer to the claim for hire. But the evidence shews that the statement is not justified by the facts. The agent for the charterer at Harburg did everything in his power to expedite the unloading of the cargo, and it is apparent that he was not able to effect his purpose in a shorter time than was really occupied by that proceeding. Therefore, the only inference which I can draw from the evidence in this case, if it were necessary to draw it, would be this, that no more than an ordinary

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time, according to the circumstances of the port, was occupied at Harburg by the discharge.

I therefore come, upon the second point, to a conclusion adverse to the decision of the Court below. I concur, upon both points, in the judgment which has been moved by the Lord Chancellor, and also in the proposal which he has made with respect to costs.

LORD BRAMWELL:—

My Lords, my opinion differs from those which have been expressed by my noble and learned friends who have already addressed your Lordships, and from those opinions which are entertained by my two noble and learned friends who have not yet spoken. I said that I did not wish to hear Mr. Barnes for the purpose of convincing me, because really it would be of very little use—it would make no difference in the judgment which your Lordships would pronounce, and the case is of no great consequence in point of amount, nor I should think in point of precedent—there is not very likely to be another case like this, I should think; therefore, Mr. Barnes was stopped on one point very much at my instance. But I must say (Mr. Finlay and his junior must forgive me) that I do not know that I have heard a stronger argument in support of what they contended for than that which Mr. Barnes used in support of his opposition to the other part of their case; so that, practically, I did hear Mr. Barnes, I may say, very much in support of the opinion which I entertain, and not against it.

My Lords, I cannot help thinking that most undue importance has been attached to the word "efficient." Now, I look at the meaning of this contract as being this—when there is a breakdown which occasions a loss of time of a substantial character, that is to say, for forty-eight hours at the least, during that lost time no hire shall be paid; but when there is no loss of time in consequence of that breakdown that is no total loss though a delay, then the hire shall be paid. That is the meaning I attribute to this contract. It seems to me to be the ordinary mercantile and reasonable meaning: when you get the benefit of the ship you shall pay for its hire. Well, but, it will be said, they did

not get the benefit of the ship on the voyage from Las Palmas to Harburg. I say they did—I say the charterer got the benefit of the ship on that voyage. It is true he paid, or largely paid, for a tug; I think it does not matter at all that he was insured, because the question is precisely the same as it ought to be if he had not been insured. I am of that opinion. If he thought fit to pay for the services of a tug for the purpose of accelerating the arrival of the vessel at Harburg, he thought fit to do it for his own purposes. He did not stipulate that if he did so he should not pay for the hire of the vessel; it seems to me that he ought to have done so. He might have refused to do it if he had liked—he might have said, "I have nothing to do with getting your vessel to Harburg; that is your affair"; but he thought fit to do it, and did not think fit to stipulate that in consideration of his doing it he should not pay for the hire.

It cannot be said that the vessel did not reach Harburg, for she did. It is true she was helped; and then the sort or argument used is, "she was not 'efficient'—she was not efficient for the purpose of her service." I say she was efficient, sub modo, even if the very word "efficient" is to be regarded, because she could do it with help. I accept what has been assumed to be true, that she was not fit to go from Las Palmas to Harburg without help; but she was fit to do it with help, and did it with help. It seems to me, as I have said before, I am afraid more than once, that an undue importance is attached to the word "efficient." I think it is an example of "qui hæret in literâ hæret in cortice." The substantial matter to my mind is that the charterer has got the benefit of the carriage of his goods in that ship from Las Palmas to Harburg, and ought to pay for it.

I think that is all I need say about the first point. With respect to the second point, of course, with the opinion which I entertain, I must concur in the judgment which has been moved and the opinions that have been expressed.

LORD HERSCHELL:—

My Lords, I concur with the view which has been put before your Lordships by the Lord Chancellor and by my noble and learned friend beside me (Lord Watson).

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I do not lay any special stress upon the word "efficient" in the phrase "efficient working of the vessel." If the word "efficient" had been left out and the word "working" had been the only word there, I think I should have come to the same conclusion as that at which I have arrived. The subject-matter of this contract of hire is a steamer as a steamer, not either as a hulk to serve as a warehouse for goods, or as a vessel to be propelled without steam by means of her sails. The hire is estimated with a view to the fact that she is a steamer and that the goods are to be brought on her intended voyage or voyages during the time of the hire by the ordinary means of propulsion by which a steamer passes through the water. When, therefore, the vessel at Las Palmas ceased to be able to prosecute her voyage as a steamer, it appears to me that there was a breakdown of the machinery, the result of which was a stoppage of the working of the vessel; and I should come to that conclusion even though it were shewn that the vessel could have proceeded under sail. That condition of things, therefore, having come about that the working of the vessel was stopped for more than forty-eight consecutive working hours, the payment of hire was to cease until she was again in an efficient state. I should have said the same if it had been "in a state to resume her service," her service being the carriage of goods as a steamer upon the stipulated voyages.

Now, it is said on behalf of the appellants that she did become in an efficient state as soon as she was taken in tow. My Lords, I am unable to accede to that argument, if it is intended to assert by it that no matter who provides the tug, or under what circumstances she takes the vessel in tow, the vessel is to be regarded as in a condition to resume her service and so earn hire. I put, during the course of the argument, the case of this vessel being in a desperate condition, only to be saved from total loss by a salving vessel which takes her in tow and brings her into port, making of course for her services a large claim. Is it to be said that as soon as she was in tow of a steamer she became efficient or became in a condition to resume her service without looking at all at where that steamer came from or who was to pay for it? I cannot think so. I do not intend to assert that if the

owner himself provided a steamer to tow the vessel into her port of destination, if he did not recover, strictly speaking, the hire under this contract, he would not be entitled to recover as for a substituted service in the same way in which, under other contracts, a shipowner who has contracted to carry goods in a particular ship on a particular voyage may recover although he does not bring them on that voyage in that ship, but tranships them and brings them in some other ship. It has never been doubted that he may, in such a case, recover in respect of the carriage of those goods. So there might have been a right (it is quite unnecessary to consider whether there would have been) of the same sort if the owner had substituted steam power outside the vessel instead of putting the machinery into a fit state within the vessel. But that is not the case here. In the present case, the vessel having broken down and not being in a condition to prosecute her voyage as a steamer, it is agreed between the owner of the cargo or the charterer and the shipowner, that it shall be treated as a joint loss, and that the vessel shall be brought home at joint expense, treating that joint expense as a general average loss arising from a disaster in the course of the voyage. That was the arrangement come to.

Now, it seems to me that, when the vessel is brought home under an arrangement of that description, she is not really prosecuting her voyage under this contract at all and cannot be so regarded, inasmuch as she is being brought home at joint cost by an arrangement of that description, in order to save the shipowner from inconveniences and to save the cargo owner from inconveniences; and, therefore, it being the interest of both parties that the vessel shall be in that way brought on, the vessel for the benefit of the shipowner, and the cargo for the benefit of the cargo owner, at their joint expense, proportioned to the value of the vessel and of the cargo respectively, I cannot regard that as in any way affording a right to a resumption of this hire, which was to be paid for the use of a steamer which could carry the goods, as a steamer from the port where she took them on board to the port of her destination.

My Lords, on the other point I agree with the view which has been already stated. It seems to me that it would be some-

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what extravagant to hold that, when a vessel has been thus by arrangement brought home, or rather brought to the port of discharge, at the joint expense, as soon as she arrives at the port of discharge you are to look back to see how she arrived there, and not rather to see what was the service then required of her, and whether she was in a condition to perform that service. It seems to me that during those ten days, whether you lay any stress on the word "efficient" or not, she was in a condition to perform the service that was required of her.

LORD MORRIS:—

My Lords, I entirely concur with the judgment which has been moved by the Lord Chancellor and with the opinions which have been expressed by him and by my two noble and learned friends opposite (Lords Watson and Herschell) as regards that portion of the voyage for which hire is claimed, namely, the part of it between Las Palmas and Harburg. But I am further of opinion that the pursuer is not entitled to recover anything.

In order to arrive at a conclusion upon this case, I think it necessary to refer to the charterparty. It appears to me that in the argument of this case in the Court in Scotland and before this House there has been some confusion between what would be the rights of the parties in the earning of freight, and under the contract contained in this charterparty for the hire of this steam-vessel out and out. The first portion that I would refer to is at the conclusion of p. 32 of the appellants' case: "That the owners agree to let, and the charterers agree to hire, the said steamship for a voyage" afterwards mentioned—that is, a voyage from certain ports mentioned to the West Coast of Africa and back again—"she being ready to receive cargo, with a clear hold, and being tight, staunch, strong, and every way fitted for the service."

Now the first question which I would ask is, What is the service contemplated there? The service contemplated there is her being a steamship fitted in all respects to go from the ports mentioned to the West Coast of Africa and back again. She was to be a vessel fit for that service. The clause at the beginning of p. 33 proceeds on the assumption that she was fitted for the

service at the starting; it provides that "the owners shall maintain her in a thoroughly efficient state in hull and machinery for the service." What service? The service of being a steamship fit to go from the ports which are defined in the concluding paragraph of p. 32.

I now come to the clause in question, and I agree with my noble and learned friend who has preceded me (Lord Herschell), that we should not give any peculiar importance to the word "efficient." I shall use it as if the word "fit" were used. The clause in question is, "That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service." I read, as I have said, "fit" for "efficient," "until she shall be in a fit state to resume her service." What service? The service contemplated of being a steamship which was originally fit to go from certain ports to the West Coast of Africa and back again. The owner contracted, under the second clause to which I have referred, to keep her in that efficient or, if you will, fit state to perform that service, namely, to go to the West Coast of Africa and back again. But as the owner would only be liable under the clause on p. 33 in an action for damages, the parties very wisely chose to measure their damages, and accordingly the measure is that the hire is to cease on the contingency of there being "a loss of time from a deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, until she be again in a fit state to resume her service." I say that I read for "efficient" "fit" only. What service? She was to be a vessel which was fit to go on certain voyages described in the concluding portion of the clause at the end of p. 32. Now, was she that? On the portion of the voyage from Las Palmas to Harburg she was clearly unable to do it. When was the moment that she again became fit? Nothing was done to her to make her fit on the first day of the discharge. When did the period begin at which she was again fit for the performance of "that service," namely, the

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service between these ports? I say, only upon the day when she was put by repairs into a state in which she was fit to perform the voyages which she was originally required to perform, and in which state the owner undertook that she should be during the whole period.

For these reasons, my Lords, I of course concur with the judgment of the Lord Chancellor and of my two noble and learned friends opposite with regard to the portion of the voyage from Las Palmas to Harburg. But I have also come to the conclusion that the pursuer is not entitled to any portion of the sum which he has claimed. The Court in Scotland appear to have given the sum of £60 in a vague sort of way. I am of opinion that if the pursuer is entitled to anything he is entitled to payment for the entire ten days occupied in the discharging, and that we cannot go into the question of dawdling in the discharge. But I am of opinion that he is entitled to nothing; and therefore I do not agree with the view which has been expressed by the majority of your Lordships that the interlocutor of the Court of Session in Scotland should be amended as proposed.

Interlocutor of the 15*th of March*, 1889, *appealed from, varied by inserting therein the sum of* £136 4*s. instead of the sum of* £60 *; and by deleting therefrom the words "Find the pursuers liable to them in expenses, remit to the auditor to tax the same and to report," and by inserting in lieu thereof the words "Find neither party entitled to expenses:" Interlocutor, subject to these variations, affirmed: Respondents to repay to the appellants the costs, under deduction of the said sum of* £60 *retained therefrom, paid by them to the respondents under the said interlocutor. Cause remitted to the Court of Session. Further ordered, that no costs be allowed to either side in respect to the appeal to this House.*

Lords' Journals, 1st Dec., 1890.

Solicitors for appellants: *Lowless & Co.*
Solicitors for respondents: *Hollams, Sons, Coward & Hawksley.*

[PRIVY COUNCIL.]

MURUGASER MARIMUTTU . . . . . PLAINTIFF; J. C.*

AND 1890

CHARLES HENRY DE SOYSA . . . . DEFENDANT. *Nov.* 11, 12.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Law of Ceylon—Fiscal Sale—Ejectment.

In an action of ejectment it appeared that the plaintiff had derived title by purchase from the mortgagor of the estate in question, and had covenanted with his vendor to pay all sums due on the mortgage; while the defendant had derived title and possession by a subsequent purchase at a fiscal sale obtained by the mortgagee in possession in proceedings to which the plaintiff was not a party:—

Held, that whether the plaintiff was bound by the fiscal sale or not, he could not in justice or in law eject the defendant without at least paying to him the moneys due on the mortgage; and that, whether he was entitled to redeem or not, there being no prayer for relief of that character, it could not be decreed to him in this action.

APPEAL from a decree in review of the Supreme Court (July 31, 1888) affirming a decree of the same Court (July 19, 1887). The decrees were in affirmance of a decree of the District Court of Negambo (Dec. 22, 1886) dismissing with costs the appellant's action.

The facts are stated in the judgment of their Lordships.

Everitt, Q.C., and *W. D. Rawlins*, for the appellant, contended that under the deed of the 26th of September, 1878, he acquired a proprietary right to the Dicklandé estate. That being so, the mortgagee of that estate could not afterwards by the law of Ceylon bind or affect the appellant's rights without first establishing the mortgage debt against him in legal proceedings to which he is a party. He has not done so, and, although the appellant has not obtained possession under his purchase, that makes no difference. The estate was not under judicial seizure when sold to the appellant. The subsequent sale by the fiscal was

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

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inoperative, for he could not convey more than the interest of the appellant's vendor, which at the time was nil. Under sect. 42 of the Fiscal's Ordinance of 1867, the conveyance of September, 1878, was not a nullity, even if the estate had been under judicial seizure: see *Anundloll Doss* v. *Jullodhur Shaw* (1). And, the appellant's title being under a duly executed and registered conveyance for valuable consideration, and prior as regards both execution and registration to the fiscal sale in 1884 to the respondent, is preferable to the respondent's title. Admitting that the conveyance of 1878 was subject to a judicial lien in favour of Tambyah, the amount of that debt has not been ascertained, and its payment is not a condition precedent to this action. Moreover, the judicial lien is claimed in respect of a judgment of the Supreme Court dated the 2nd of July, 1875, which has never been registered in pursuance of Ordinance No. 8 of 1863, sect. 38. Reference was made to Thomson's Institutes, vol. i., pp. 343, 346, and vol. ii., p. 298.

Sir *H. Davey*, Q.C., *Jeune*, Q.C., and *Gray*, for the respondent, were not heard.

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Nov. 12.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

In this case the plaintiff, Marimuttu, claims possession of the Dicklandé estate under a conveyance from one Nannytamby dated the 26th of September, 1878. That deed of conveyance shews that a person named Tambyah was mortgagee in possession of the estate, and that the amount of his mortgage was unascertained; that it was the subject of a suit pending in the Supreme Court, and was to be decided by principles laid down by the Supreme Court; and the plaintiff covenants with his vendor that he will pay and discharge all sums of money due to Tambyah as mortgagee in possession of the premises. Whether those accounts have been completed, and the sum has been ascertained, is a matter of dispute between the parties. There is an order of the District Court of Kalutara on the subject; but it is contended by the plaintiff that the accounts which are affirmed by that order have not been taken in accordance with the prin-

(1) 14 Moore, Ind. Ap. Ca. 543.

ciples laid down by the Supreme Court. In the view their Lordships take of this case, it does not signify whether the accounts have been finally ascertained or not. The nature of Tambyah's mortgage was this. In point of form he was the purchaser out and out of the estate from Nannytamby. But the conveyance to him was disputed by a creditor of Nannytamby, who instituted a suit for the purpose of setting it aside as fraudulent. In that suit the Court held that the true contract between the parties was not a contract of sale out and out, but that money had been advanced; and by its decree of the 2nd of July, 1875, it ordered that Tambyah should stand as mortgagee in possession for the amount of money advanced, and it went on to decree that, when the accounts had been taken, and the amount due upon the mortgage ascertained and repaid by Nannytamby to Tambyah, Tambyah should be bound to retransfer the estate to Nannytamby. Therefore, Tambyah was owner of the estate to the extent that he could properly remain in possession of it until he was paid the amount which was due on the transactions between him and Nannytamby. Subsequently to the sale to the plaintiff in 1878, Tambyah took certain proceedings under which sales of the estate were made. The details are a little complicated, and it is not now material to go into them; but, ultimately, the defendant became the purchaser of the estate at a fiscal sale, and he now claims to be absolute owner of the estate under that sale. The plaintiff contends that he was no party to the proceedings by Tambyah, and that he is not bound to recognize the sale to the defendant. Whether that is so or not has been the subject of much argument, and was the subject of difference among the judges in the Court below. But, for the purpose of the present decision, and for that purpose only, their Lordships will assume that the plaintiff is right in his contention. Supposing he is right, what is the effect? The effect must be to replace Tambyah, or anybody who stands in the shoes of Tambyah, in the position which Tambyah held under the decree of the Court as mortgagee in possession. He would be in lawful possession of the estate until he is paid the money due to him on the transactions between Tambyah and Nannytamby.

The plaintiff now asks to be declared the owner of the Dickandé estate, and that the defendant be declared not entitled

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thereto, and be ejected therefrom, and the plaintiff placed in possession thereof; and he further asks for damages, and for a sum of Rs.15,000 a year during the time for which the defendant has been in possession. Not a single word about payment of the mortgage which is due either to Tambyah or to the defendant. What the plaintiff desires by his plaint is to get into possession without any payment at all. That seems to their Lordships to be in the teeth of the decree of 1875; to be in the teeth of the contract which the plaintiff entered into when he made his purchase from Nannytamby; and to be a glaring injustice towards the defendant, who has honestly paid for his estate, and is entitled at least to all that Tambyah himself could claim.

Their Lordships were told that there were some authorities in the Courts of Ceylon which would shew that such an injustice as that was lawful. They hardly expected that such authorities would be produced; at all events they have not been produced; and their Lordships must hold that there is no ground in justice and in law for the relief that the plaintiff asks.

This is a case in which the plaintiff should be held strictly to the relief that he prays for. It is suggested at the bar that he may be entitled to redeem. He may be so entitled, and for the purpose of this decision it is assumed in his favour that he is so entitled; but he does not ask it, and their Lordships do not know at this moment that he wishes it. On the contrary, so far as the materials on this record go, their Lordships have reason to think that he does not wish it, because in 1882 he did institute a suit to redeem Tambyah, and he apparently never proceeded beyond the filing of the plaint. Now he prays for a totally different relief, and it must be taken that he does not desire any relief except that which he prays for. That relief cannot be given him for the reasons indicated above, and his plaint must therefore be dismissed.

The result is that this appeal must be dismissed, and with costs, and the judgment of the Court below affirmed.

Their Lordships will humbly advise Her Majesty in accordance with that opinion.

Solicitors for the appellant: *Clarke, Rawlins & Co.*

Solicitors for the respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

JENOURE . . . . . DEFENDANT;

AND

DELMEGE . . . . . PLAINTIFF.

J. C.*
1890
Nov. 18, 25, 26;
Dec. 19.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Libel—Privileged Communication—Onus probandi—Misdirection.

No distinction can be drawn between one class of privileged communications and another: they all imply that the occasion rebuts the inference that the defendant is actuated by mala fides, and casts the burden of proving malice on the plaintiff.

Where the jury were told that the existence of privilege was contingent upon whether in their opinion the defendant honestly believed his volunteered communication to be true, and that the burden of proof to that effect was upon him, *held*, that this was misdirection, and that a verdict for the plaintiff must be set aside.

APPEAL by special leave from an order of the Supreme Court (July 26, 1888), refusing an order nisi for a new trial except upon one of the grounds on which the Court was moved; also from an order (September 5, 1888) discharging the said order nisi. The action was brought by the respondent to recover £500 damages in respect of a libel alleged to be contained in the letter set out in their Lordships' judgment.

The appellant pleaded that he was a justice of the peace for the parish of Portland, and he denied the publication of the libel, and pleaded in the alternative that the occasion was privileged, and that the said letter was written bonâ fide without malice, and in his capacity of justice of the peace, and he also pleaded justification.

Verdict for the respondent for £50, and judgment was entered for that amount and costs.

The order nisi for a new trial was on the ground that the learned judge misdirected the jury in leaving to them the question whether or not the occasion of the communication was privileged.

* *Present*:—LORD MACNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

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Henn Collins, Q.C., and *Montagu Lush*, for the appellant, contended that the order discharging the rule nisi should be reversed, and that a new trial should have been granted. It was contended that the judge ought to have directed the jury that the inspector of constabulary was the proper person to whom the appellant, in his capacity of justice of the peace, should publish the letter, and that therefore the occasion was privileged. Also, that if the appellant bonâ fide but erroneously believed that the inspector was such person the occasion would be privileged. The judge ought not to have left the question of privilege to the jury, and as preliminary thereto left it to them to decide whether the appellant bonâ fide believed the statements in his letter to be true. What the judge ought to have done was to decide himself that the occasion was privileged, and then have directed the jury that in order to succeed the respondent must have proved that the appellant was actuated by malice. There was no finding of malice, and no evidence on which such a finding could have been made. [Reference was made to *Somerville* v. *Hawkins* (1); *Taylor* v. *Hawkins* (2); *Harris* v. *Thompson* (3); *Cooke* v. *Wildes* (4); Starkie on Libel, p. 250; *Pattison* v. *Jones* (5); *Stace* v. *Griffith* (6); *Fairman* v. *Ives* (7); *Waring* v. *M'Caldin* (8); *Maitland* v. *Bramwell* (9); *Dawkins* v. *Lord Paulet* (10); *Clark* v. *Molyneux* (11); *Spill* v. *Maule* (12).]

Jelf, Q.C., and *F. Salford* (*Meryon White*, with them), for the respondent, submitted that the verdict and judgment were right. There was evidence to go to the jury, and viewing that evidence reasonably the verdict was one which a jury could find. There was no misdirection. The cases on the other side were referred to, the first six being relied on in support of the respondent. [Reference was also made to *Davies* v. *Snead* (13), followed in

(1) 20 L. J. (C.P.) 131.
(2) 16 Q. B. 321.
(3) 13 C. B. 333.
(4) 5 E. & B. 328.
(5) 8 B. & C. 578.
(6) Law Rep. 2 P. C. 428.
(7) 5 B. & Ald. 642.
(8) 7 Ir. R. C. L. 282.
(9) 2 F. & F. 623.
(10) Law Rep. 5 Q. B. 102.
(11) 3 Q. B. D. 237, 240.
(12) Law Rep. 4 Ex. 232.
(13) Law Rep. 5 Q. B. 608.

Waller v. *Loch* (1); *Padmore* v. *Lawrence* (2); *Scarll* v. *Dixon* (3); *Howe* v. *Jones* (4); *Macdougall* v. *Knight* (5).]

Collins, Q.C., replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

This was an action of libel brought by the respondent Louis Edward Delmege against the appellant Frederick Alfred Jenoure.

The respondent is a Government medical officer in the parish of Portland. The appellant is a pen-keeper residing in the same parish, and a justice of the peace.

The libel complained of was contained in the following letter addressed by the appellant to the inspector of constabulary for the district:—

"Boston, Priestman River,
14th January, 1888.

"Sir,—I have been informed on good authority that Dr. Delmege, of Manchioneal, was called by one Lindsay (who, I believe, is his servant) to attend a woman in labour named Zipporah Henry, of Manchioneal, on Sunday, 8th January; that, although implored by Lindsay to attend the woman, the doctor refused to do so without the fee, and that consequently the woman died on Monday morning from want of medical attendance. I shall be obliged, in the interest of humanity, especially as I am informed it is by no means an uncommon occurrence for Doctor Delmege to refuse to attend such cases, if you will inquire into this matter, and if the facts prove to be as stated, that you will report the case to the proper authority, as such wilful neglect cannot be allowed.

"I am, Sir,
"Your obedient servant,
"F. A. JENOURE, J.P.

"R. L. Rivett, Esq.,
"Inspector of Constabulary,
"Port Antonio."

(1) 7 Q. B. D. 621.
(2) 11 Ad. & E. 380.
(3) 4 F. & F. 250.
(4) 1 Times L. R. 461.
(5) 14 App. Cas. 194.

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The appellant pleaded that the statements contained in the letter were true in substance and in fact, and that the occasion of the publication was privileged.

The action was tried before Sir Adam Gib Ellis, C.J., and a special jury. A great number of witnesses were examined on both sides. Evidence was adduced by the respondent raising the question of express malice. In the result the jury returned a general verdict for the respondent with £50 damages, and judgment was entered accordingly.

The appellant moved for a new trial. The motion was made on several grounds. But on the 26th of July, 1888, a rule was granted, only on the ground of misdirection with regard to the question of privilege.

The rule came on for argument before Ellis, C.J., and Curran and Northcote, JJ. On the 5th of September, 1888, the Court unanimously discharged the rule and confirmed the judgment.

The appellant subsequently applied for and obtained special leave from Her Majesty in Council to prefer an appeal. And he has appealed, not only from the order of the 5th of September, 1888, but also from that of the 26th of July, 1888, as well as from the verdict and the judgment entered thereon.

The case was very fully and ably argued. The arguments were not limited to the question of misdirection. The learned counsel for the appellant contended that the verdict was against evidence and ought to be set aside on that ground. The learned counsel for the respondent laboured to prove that the misdirection (if misdirection there was) might be regarded as immaterial, and that on the facts, which were all before the jury, no other verdict could properly have been returned. Their Lordships intimated in the course of the argument that they could not accede to either view. If actual malice had been found it would have been difficult to have contended that there was no evidence before the jury to support the finding. At the same time, taking all the circumstances into consideration, and bearing in mind that the language of a privileged communication is not to be scrutinized too strictly, as was observed in *Laughton* v. *Bishop of Sodor and Man* (1), their Lordships think that the jury might properly have

(1) Law Rep. 4 P. C. 495, 508.

held that the evidence was consistent with the non-existence of malice. The question was pre-eminently one for a jury to determine under proper direction.

Their Lordships have not the advantage of seeing a note of the summing-up. But the substance of it, so far as material on the question of misdirection, is stated very clearly in the judgment of the Chief Justice upon the application to make the rule absolute.

The Chief Justice told the jury that it was the duty of the appellant, as a justice of the peace, to bring circumstances such as those mentioned in his letter to the notice of the proper authorities. Their Lordships may observe in passing that, in their opinion, nothing turns on the position of the appellant as justice of the peace. To protect those who are not able to protect themselves is a duty which every one owes to society. The Chief Justice went on to tell the jury that the proper authority to whom such a complaint should have been submitted was the superintending medical officer; but he also told them that, if they thought that the appellant had addressed the letter to the inspector of constabulary by an honest unintentional mistake as to the proper authority to deal with the complaint, then the communication would not be deprived of any privilege to which it would have been entitled had it been addressed to the superintending medical officer. So far the summing-up seems to be open to no objection. The Chief Justice then proceeded to explain to the jury that the existence of privilege was contingent on whether, in their opinion, the appellant honestly believed the statements contained in the letter to be true. The meaning of the Chief Justice is made perfectly clear by what follows. After referring to cases where the alleged defamatory matter was spoken or written by masters with reference to the characters of servants, he points out that, in such cases, "no question as to the bona fides of the defendant arises as preliminary to the existence of privilege." Where, however, "it is alleged that the defamatory communication was made in discharge of a duty," his view was that the defendant must "satisfy the jury that he made the communication with a belief in its truth." "No doubt," he adds, "the dicta of some of the judges in the masters and servants

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cases cited seem to extend to all classes of privileged communications; but no case was cited, and I have been able to find none, where, when privilege was claimed on the ground that the communication was made in the discharge of a duty, it has been held that the plaintiff, to support his action, must prove express malice. . . . In the one case, there can be no room for doubt that, if the defendant establish the relation which existed between him and the plaintiff, a privilege arises which can only be overcome by proof of express malice. In the other, the authorities already cited shew that, where a defendant claims privilege in respect of a charge of misconduct volunteered by him, he must satisfy the jury that he acted bonâ fide before the question of privilege arises for the determination of the judge."

There can be no doubt, therefore, that the learned Chief Justice gave the jury to understand that it lay upon the appellant to prove affirmatively that he honestly believed the statements contained in the alleged libel to be true, and that, unless and until that was made out by him to their satisfaction, it was not incumbent on the respondent to prove express malice.

Curran, J., took the same view of the authorities, and Northcote, J., concurred.

Notwithstanding some dicta which, taken by themselves and apart from the special circumstances of the cases in which they are to be found, may seem to support the view of the Chief Justice, their Lordships are of opinion that no distinction can be drawn between one class of privileged communications and another, and that precisely the same considerations apply to all cases of qualified privilege. "The proper meaning of a privileged communication," as Parke, B., observes—*Wright* v. *Woodgate* (1)—"is only this: that the occasion on which the communication was made rebuts the inference primâ facie arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made." There is no reason why any greater protection should be given to a communication made in answer to an inquiry with

(1) 2 C. M. & R. 577.

reference to a servant's character than to any other communication made from a sense of duty, legal, moral, or social. The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case bona fides is always to be presumed.

Their Lordships consider the law so well settled that it is not in their opinion necessary to review the authorities cited by the Chief Justice. The last case on the subject is *Clark* v. *Molyneux* (1), to which, unfortunately, the attention of the Supreme Court was not called. That was a case, not of master and servant, but of a communication volunteered from a sense of duty. A verdict was found for the plaintiff. But it was set aside by the Court of Appeal on the ground of misdirection. In giving his judgment, Cotton, L.J., used the following language, every word of which is applicable to the present case. "The burden of proof," he said, "lay upon the plaintiff to shew that the defendant was actuated by malice; but the learned judge told the jury that the defendant might defend himself by the fact that these communications were privileged, but that the defendant must satisfy the jury that what he did he did bonâ fide, and in the honest belief that he was making statements which were true. It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty."

Their Lordships are therefore of opinion that there was a misdirection on a material point, which may have led to a miscarriage. Indeed, it is difficult to see how the jury could have done anything but find for the plaintiff, having regard to the way in which the question was presented to them. The jury were told that it was for the defendant to prove that he honestly believed the statements in his letter to be true; whereas the letter itself put those statements forward, not as matters of the truth of which the writer had satisfied himself, but as matters calling for inquiry and consideration by the proper authorities.

(1) 3 Q. B. D. 237.

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Their Lordships think that the verdict cannot stand; that the judgment entered thereon, and the orders of the 26th of July, 1888, and the 5th of September, 1888, ought to be discharged, and that there ought to be a new trial; but only on the terms that the plea of justification is not to be raised again. It seems to their Lordships that that issue has been finally disposed of.

As regards the costs in the Court below, their Lordships think that the respondent is entitled to the costs of the issue as to justification, and that the other costs of the trial and the costs of the motion for a new trial, and the argument upon the rule before the Supreme Court, ought to abide the result of the new trial. Their Lordships will humbly advise Her Majesty accordingly. The appellant must have the costs of this appeal.

Solicitors for the appellant: *Tucker & Lake.*
Solicitors for the respondent: *Tippetts & Son.*

[HOUSE OF LORDS.]

HOLLIDAY AND OTHERS . . . . . APPELLANTS;

AND

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF WAKEFIELD . . . . . RESPONDENTS.

H. L. (E.) 1890 Dec. 15.

Waterworks—Reservoir—Mines—Compensation for Minerals not Workable—Prospective Injury to Mine—Apprehended Injury—Waterworks Clauses Act 1847 (10 & 11 *Vict. c.* 17) *ss.* 6, 22, 25, 27.

A special Act incorporating the Waterworks Clauses Act 1847 empowered the making of a reservoir in lands containing coal mines. The waterworks undertakers having given the mine-owners notice to treat for part of the coal, the mine-owners claimed compensation (to be settled by arbitration) not only for the value of the land to be taken (as to which no question arose) but also for injurious affection and prospective damage. The arbitrator found that the workings of the mine-owners had not as yet approached the reservoir so as to cause any present risk to the mines from the existence of the reservoir: that if the mine-owners were free to work their mines without risk of interruption from the undertakers' works, they could and would have got the whole of certain seams of coal under the reservoir and within forty yards of the boundary, and that if the undertakers purchased and retained in situ the coal which they had given notice to take and no other coal, the mine-owners, by reason of the undertakers' works and of apprehension of injury therefrom to one seam, could not get more than 50 per cent. of the coal under the reservoir or within twenty yards of its boundary: that a prudent lessee working without right to compensation would be compelled by reason of such apprehension of injury to abstain from working more than 50 per cent. of the coal within the defined area; and that there was no reason to apprehend injury present or future from the undertakers' works to any part of the mines if 50 per cent. of the coal in the defined area were retained in situ:—

Held, affirming the decision of the Court of Appeal (20 Q. B. D. 699), that the mine-owners were not entitled to claim or to recover compensation for the prospective prevention of the working of more than 50 per cent. of the coal within the defined area: inasmuch as though the word "lands" in sect. 6 of the Waterworks Clauses Act 1847 includes "mines," the mine-owners were not injuriously affected within the meaning of sect. 6; neither could they at present claim or recover under the mines clauses of that Act, sects. 18 to 27.

APPEAL from so much of an order of the Court of Appeal (Fry and Lopes L.JJ., Lord Esher M.R. dissenting) as was

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adverse to the appellants. That order reversed in part a judgment of the Queen's Bench Division (Mathew and Cave JJ.) (1).

The following statement of the material facts is taken from the judgment of Lord Herschell:—

The respondents were authorized by the Wakefield Waterworks Act 1880 to construct certain waterworks with a reservoir at Ardsley. The Waterworks Clauses Act 1847 and the Lands Clauses Act were incorporated with this Act.

By two leases, dated the 26th of August and the 8th of December 1873, four seams of coal, known as the Cannel, the Doggy, the Little, and the Middleton, underlying certain lands, were demised to the appellants for forty years, from the 1st of August 1872 and the 2nd of February 1873 respectively, subject to the payment of certain minimum and other rents.

About the year 1872 the appellants sunk a shaft at East Ardsley, and have worked and still continue to work the Middleton, Little, and Doggy seams under both leases. They have not yet begun to work the Cannel seam. Before the 19th of June 1883 the corporation had, under the said Act, acquired certain lands, including land the coal under which was demised by the leases I have referred to, and had begun to make their reservoir on the acquired land. On that day the appellants gave notice to the respondents that they were the lessees of the coal lying partly under the proposed reservoir and partly under land within forty yards of the prescribed limits of the appellants' works, and that they intended to work the same. The respondents thereupon gave the appellants a counter notice to the effect that if the reservoir was made and the appellants should by fair and regular working approach within the distance prescribed by the Waterworks Clauses Act 1847, the respondents would expect the appellants to give the usual notice, and would then be ready to take such steps as could lawfully be required of them.

Prior to the month of November 1883 the appellants had made preparations to bore with a view to sinking a pit at a spot where such a pit would have interfered with the proposed reservoir. Although the minerals only were demised to them, they were empowered, for the purpose of working the minerals, to sink pits and exercise other rights on the surface.

(1) 20 Q. B. D. 699.

On the 1st of November the respondents gave the appellants notice to treat for thirty-five acres of the Middleton seam, and also for their surface rights over certain lands defined by the notice. The appellants on the 19th of November gave particulars of their claim for compensation in respect of these matters, and desired that the amount should be settled by arbitration. Arbitrators and an umpire were accordingly appointed for that purpose. A further notice was afterwards given by the appellants that they would claim in the arbitration compensation in respect of the injurious affecting of their seams of coal, and for so much of their seams not purchased by the respondents as could not be worked by reason of the making and maintaining of their works, or by reason of the apprehended injury in the working thereof. The respondents disputed the validity of the notice and their liability to make the compensation claimed. It was, however, agreed that without prejudice to the contention of the respondents the matters in the last-mentioned notice should be taken to be within the jurisdiction of the arbitrators and umpire to the same extent and in the same manner as if they had been comprised in the claim of the 19th of November. The arbitration accordingly proceeded, and the umpire made his award in the form of a special case for the opinion of the Queen's Bench Division.

He found that the workings of the appellants had not as yet approached the reservoir in such a manner as to cause any present risk to the appellants' mines or seams from the existence of the reservoir assuming it to be filled with water. That if the appellants were free to work their mines without risk of interruption from the respondents' works, they could and would have got the whole of the Middleton and Cannel coal under the reservoir and within forty yards of the boundary, within the terms of their leases, and that if the respondents purchased and retained in situ the thirty-five acres of the Middleton seam which they had given notice to take, and no other coal in that or any other seam, the appellants, by reason of the respondents' works and of apprehension of injury therefrom to the Cannel seam, could not work or get more than 50 per cent. of the cannel and black coal under the reservoir or within twenty yards of its boundary. He also found that a prudent lessee working without right to compensation

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would be compelled by reason of such apprehension of injury to abstain from working or getting more than 50 per cent. of the cannel and black coal in the area above described, and that there was no reason to apprehend injury, present or future, from the respondents' works to any part of the Doggy seam or of the Little seam or to any part of the Cannel seam, if 50 per cent. of the cannel and black coal in the defined area were retained in situ, or to any part of the Middleton seam.

The first question submitted for the opinion of the Court (which alone it is necessary to state) was as follows:—

Whether by virtue of the Waterworks Clauses Act or of the Lands Clauses Act, or otherwise, the claimants are entitled upon this arbitration to claim and to recover compensation for the prospective prevention of the working of more than 50 per cent. of the cannel and black coal within the defined area.

The Divisional Court answered this question in the affirmative; but the Court of Appeal, by a majority, reversed this decision, and ordered that the question should be answered in the negative (1).

1890. March 18; May 5, 6. Sir *R. Webster* A.-G. and *Rigby* Q.C. (*George Banks* with them) for the appellants:—

The appellants are entitled to compensation now for the loss of 50 per cent., and can claim it in one of two ways under the Waterworks Clauses Act 1847. By sect. 3 "lands" includes hereditaments of any tenure, and therefore mines: *Smith* v. *Great Western Railway Company* (2). Mines therefore are "lands" within sect. 6; and the appellants' mines are "injuriously affected by the construction and maintenance of the works" authorized by the special Act, viz. the reservoir. The being prevented from working more than 50 per cent. is an injurious affection. Part

(1) 20 Q. B. D. 699. The second question submitted for the opinion of the Court was:—Whether by virtue of the said Acts or otherwise, the claimants are entitled upon this arbitration to claim and to recover compensation for being prevented from sinking a shaft at Blue Pits. The umpire made alternative awards for different sums, according as the two questions were answered in the affirmative or negative. The second question was not contested in either Court, and both the Divisional Court and the Court of Appeal answered it in the affirmative.

(2) 3 App. Cas. 165, 180.

of the appellants' lands are taken, and they come within the principle of injurious affection as laid down in the decided cases ending with *Cowper-Essex* v. *Local Board for Acton* (1). Compensation was intended by the legislature to be assessed once for all: *Croft* v. *London and North-Western Railway Company* (2). If therefore it is not assessed now, it never can be; but if the case is not within sect. 6, it comes under sect. 25, by which the undertakers are to pay "for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the said works, or by reason of such apprehended injury from the working thereof as aforesaid." The "apprehended injury" is the not being able to work. The clause is similar to sect. 81 of the Railways Clauses Act 1845, which has been held to include prospective injury: *Whitehouse* v. *Wolverhampton Railway Company* (3). The judgments of the Divisional Court and of Lord Esher M.R. state the reasons for the appellants' contention.

Sir *H. James* Q.C. and *Meadows White* Q.C. (*R. S. Wright* with them) for the respondents.

Rigby Q.C. in reply.

The HOUSE took time for consideration.

Dec. 15, 1890. LORD HALSBURY L.C.:—

My Lords, I will in the first instance read the judgment of my noble and learned friend, Lord Bramwell, who is unfortunately unable to be present to-day.

[His Lordship then read the judgment of]

LORD BRAMWELL:—

My Lords, I am of opinion that "lands" in sect. 6 includes mines. The words in the interpretation clause are the same as in the Railways Clauses and the Lands Clauses Acts. Lord Cairns in *Smith* v. *Great Western Railway Company* (4) so held.

(1) 14 App. Cas. 153.
(2) 3 B. & S., at p. 453.
(3) Law Rep. 5 Ex. 6.
(4) 3 App. Cas. 180.

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I do not understand Cave J. to think differently. Unless "mines" are included there is no power to take them. One question then in this case is whether the appellants are entitled to judgment by virtue of sect. 6.

Before considering that, however, I think it desirable to examine the sections specially relating to mines. It is suggested that they take away any right that would exist under sect. 6, or shew that none exists under it, and give no right themselves.

I do not think they take away any right, though they help to shew that none exists under sect. 6. They are, with exceptions I shall notice, the same as in the Railways Clauses Act. I cannot see why compensation should be delayed in railway cases, nor in waterwork cases. If a present damage, there ought to be a present compensation. As Mathew J. says, waterwork undertakers might become insolvent. It seems to me that if the law was meant to be otherwise it ought to have been expressed directly in plain language, and not left to be inferred by implication. I will now proceed to examine those clauses.

They are introduced by the words, "And with respect to mines be it enacted as follows." The provisions are, as I have said, of the same character as those in the Railways Clauses Act, sects. 77 to 85, with variations.

The difference between 8 & 9 Vict. c. 20, s. 81 and the corresponding sect., 10 & 11 Vict. c. 17, s. 25, is that the latter includes not only "minerals which cannot be obtained by reason of making and maintaining the works," but also those which cannot be obtained "by reason of apprehended injury from the working thereof." There is also in the Waterworks Act sect. 27, on which I shall comment. There is no corresponding section in the Railways Clauses Act. I will only quote 10 & 11 Vict. c. 17, those in the Railways Clauses Act being the same with the exceptions I have mentioned.

Sect. 18 enacts that the undertakers shall not be entitled to mines under lands purchased, nor shall they pass by a conveyance unless expressly mentioned. Sect. 22 says that when within the prescribed distance the mine-owner shall give notice, and if the undertakers will purchase, the mine-owner shall not work, and provides for compensation to him.

Sect. 23 says if the undertakers will not purchase, the mine-owner may work so that no wilful damage be done and the works are in the usual way. This is to some extent for the benefit of the mine-owner.

Sect. 24 says if the working of the mines be prevented "by reason of apprehended injury to such works," the mine-owner may make air-ways and other conveniencies. This also is to some extent for the benefit of the mine-owner.

Sect. 22 does not compel the undertakers to purchase, nor do sects. 23 and 24. Neither of them gives the mine-owner a right to compel purchase. He may, indeed, work if his mines are not purchased, but, for aught that I can see in these sections, at the risk of letting down the reservoir and of being flooded. These sections might be adequate under the Railway Act, where it is difficult to suppose any possible damage to the mine-owner analogous to flooding. They may have been thought to be so in the Act in question. It may be that sect. 27 of the Waterworks Act is the remedy. There is, as I have said, no section of the same sort in the Railways Clauses Act. That section says, that "nothing in the Act shall prevent the undertakers being liable to any action to which they would have been liable for any damage done to any mines by means of the waterworks in case the same had not been constructed or maintained by virtue of the Act." I do not see why this should not mean what it says, viz., that if the mine-owner works his mine and is flooded from the reservoir he may maintain his action for the damage, and so from time to time as often as he is flooded. His mine he cannot get, but he may have right of action. This clause may be put in to guard against the arguments that prevailed in *Rex* v. *Pease* (1) and *Hammersmith Railway Company* v. *Brand* (2), as but for the reasons that prevailed in those cases it would be law without an enactment (*Rylands* v. *Fletcher* (3)).

So far, there is no provision in these clauses compelling the undertakers to take or pay for any mine, or pay any compensation to the mine-owner, unless they stop him under sect. 22. But there remains sect. 25 to be considered. That says that the

(1) 4 B. & Ad. 30. (2) Law Rep. 4 H. L. 171.
(3) Law Rep. 3 H. L. 330.

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undertakers shall from *time to time* pay to the owner, &c. of mines extending so as to lie on both sides of any reservoirs, buildings, pipes, conduits, or other works, all additional expenses and losses incurred by such owner by reason of the severance of the lands over such mines, or of the continuous working thereof being interrupted, or by reason of the same being worked under the restrictions of this or the special Act, and for any mines not purchased by the undertakers which cannot be obtained by reason of making and maintaining such works, or by reason of such apprehended injury from the working thereof as aforesaid. I agree with Fry L.J. that this is apprehended injury to the works of the undertakers. The words are "*such* apprehended injury," to be settled as other cases of disputed compensation. And it means apprehended by the undertakers, and that not a mere alarm in their minds, but one on which they have acted by stopping the works under sect. 22. I do not understand this clause. It seems to me to provide for what is already provided for by sect. 22. This at least is certain, that it gives no right to the mine-owner to compel the taking of, and paying for, any mine. Nor can I see it gives any right of compensation unless the mine-owner is stopped. Also, it seems to me, with submission, clearly to be limited to the case of the mine or minerals being on both sides of the works or some of them. This section then gives no right to the mine-owner to compel the taking of, or compensation for, mines.

It seems to me, then, that if the appellants have any right it must be under sect. 6, and whether they have depends on whether their mines are "injuriously affected by the construction or maintenance of the works, or otherwise by the execution of the powers conferred." I cannot think they are. I agree with Fry L.J. and his reasoning. They are not at present; nor ought they to be, nor need they be, in future. If, when they reach the prescribed distance of the respondents' works, the appellants give the notice they are bound to give, the respondents must purchase such mine as is necessary, if any; or, if they do not, they must keep their reservoir from leaking or they will be liable to an action. Of course, it is better to have money down for being prevented working than to be prevented, and not

only lose the mine but be put to expense. But I should think that on reaching the prescribed distance, if there was real danger of the reservoir being let down, and the appellants flooded if they worked, proceedings could be taken to restrain the respondents from damaging the mines, and so they would be compelled to purchase. However that may be, they are not now injuriously affected; not within the finding of the award. The arbitrator finds that a prudent lessee working *without right to compensation* would be compelled by reason of the apprehension of injury to abstain from working or getting more than fifty per cent. of the cannel coal. But this is just what the appellants, when they work, or want to work, the cannel coal, will not be, i.e., without a right to compensation. The respondents will have to stop and compensate them, or, if not, they will have to keep the reservoir watertight or pay for all damage. It seems to me that the claim of the appellants takes away the rights of the respondents to say which they will do. I cannot say that the appellants' mines are injuriously affected by the respondents' works within sect. 6. I cannot see that *Whitehouse* v. *Wolverhampton Railway Company* (1) helps the appellants.

I am of opinion the judgment should be affirmed.

[His Lordship then read his own judgment.]

LORD HALSBURY L.C.:—

My Lords, I think the question in this case turns upon the true construction of the Waterworks Clauses Act 1847, and, before dealing with the particular clauses under which the question in this case arises, it is material to notice what is the problem which the legislature had to solve in giving compulsory powers for the construction of waterworks, and the contingencies which were likely to arise in the maintenance of the works constructed.

With reference to some public works of a different character, such as railways and the like, two principles appear to have been established as those upon which legislation should be founded: one, that the works when so established should not be

(1) Law Rep. 5 Ex. 6.

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subject to be impeached in a Court of law for any damage or annoyance they might cause by reason of their ordinary use; and as a correlative of this principle, that any person whose land would be injuriously affected by the construction of the works should, in lieu of his right of action, be entitled to compensation—a compensation which must, except where otherwise specially provided, be assessed once and for ever, and not subject to increase or diminution after that one assessment.

The legislature, having before its mind the peculiarity of waterworks, departed, in the statute under construction, from both these principles. Compensation in the form of damages might still be claimed against a waterworks company, notwithstanding that they were constructed and maintained by virtue of an Act of Parliament, and compensation, as such, might be made from time to time and not be assessed once and for all.

It is not difficult to see what was in the mind of the legislature when dealing with such a subject-matter as the establishment of large reservoirs of water in relation to underground workings by persons, other than the undertakers of the waterworks, in winning mines and minerals which *primâ facie* were not to belong to the undertakers of the waterworks. The undertakers and the mine-owner have a common interest in the security of the reservoir—the one to preserve the water which the reservoir was intended to retain; the other to keep the power of working out the minerals which the leaking of the reservoir would prevent them from winning by the drowning of the mine.

But, except so far as it should be necessary to preserve both these rights for those respectively interested in them, the legislature appears to have thought that it was expedient that both mine-owner and waterworks undertaker should be left free to pursue their respective industries without interference. It is the interest of the mine-owner to be allowed to retain his mine; it is the interest of the waterworks undertaker not to be called upon to pay more for land than was necessary for the purpose of his undertaking.

Accordingly, while the 6th section of the Waterworks Clauses Act, which in terms refers to the construction of the works,

enables the undertakers, if they please to pay for it, to take all land including mines for the construction of their works (and I cannot doubt that in that section the word "lands" does include mines and minerals), yet by the 18th section of the Act and the sections which follow it, the relations between the owners of the waterworks and the mines are I think intended to be exhaustively regulated, and I agree with the Master of the Rolls, if not altogether for the same reason, that compensation, if it can be given at all, must be sought for under the code specially relating to mines in the statute.

Now it is provided that the mine-owner shall not get his minerals within the prescribed distance of the waterworks without giving due notice to the undertakers, obviously to afford the undertakers the opportunity to purchase if they will, and so prevent any working beyond the prescribed distance. The Act itself prescribes a distance if no distance is prescribed by the special Act; but it contemplates the possibility of the undertakers being familiar with the works they are about to execute, and procuring a different prescribed distance from that which the Act itself enacts in the absence of any special prescribed distance.

Now this being so far the scheme of legislation, let us see what are the facts on which the question in debate arises. This depends on the 13th paragraph of the finding of the arbitrator, which is as follows: "(13) The workings of the claimants have not as yet approached the reservoir in such a manner as to cause any present risk to the claimants' mines or seams from the existence of the reservoir, assuming it to be filled with water. If the claimants were free to work their mines or seams without risk of interruption from the works of the corporation, they could and would have got the whole of the Middleton and Cannel coal under the reservoir and within forty yards of its boundary within the respective terms of their leases. Assuming the corporation to purchase and retain in situ the 35A. 3R., and 24P. of the Middleton seam for which they have given notice, and no other coal in that or any other seam, the claimants, by reason of the corporation works and of apprehension of injury therefrom to the Cannel seam, could not work or get more than

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50 per centum of the cannel and black coal under the reservoir or within twenty yards of its boundary (being the area edged orange on the annexed plan), and I find that a prudent lessee working without right to compensation would be compelled by reason of such apprehension of injury to abstain from working or getting more than 50 per cent. of the cannel and black coal in their such last-named area."

Now I think that, in order to bring the mine-owner in this case within sect. 25 of the statute, the continuous working of the mines or minerals must have been "interrupted *as aforesaid*," that is manifestly under sect. 22; "or by reason of such apprehended injury from the working thereof *as aforesaid*." Sects. 23 and 26, giving power respectively to the owner to work his mines and to the undertakers to inspect the working of the mines after giving twenty-four hours' notice, shew, I think, the complete scheme of the Act, supplemented perhaps by 26 & 27 Vict. c. 93, ss. 3 to 10 inclusive.

I am not certain that the Act I have just referred to does not suggest that the legislature had thought from the experience of facts that the undertakers of water companies were not sufficiently under supervision in respect of the security which other people were entitled to, and accordingly framed an additional code by which danger to other people might be averted and such undertakers compelled to look to the safe condition of their reservoirs. But dealing with the matter as it was left under the Act of 1847, each case of difficulty and interference with their respective rights appears to have been provided for or intended to be provided for by the sections now under construction.

Now, with one exception, namely, the apprehended injury (which it appears to me to be impossible to contend is not the same apprehended injury throughout sects. 22, 24 and 25), the language of sect. 25 is copied almost totidem verbis from sect. 81 of the Railways Clauses Act, where no such reciprocal danger on the part of the mine-owner could have arisen.

I cannot therefore find on the facts as set forth in the award any danger which those sections contemplated as the subject of compensation.

There is, as I have before remarked, all the difference between

the principles upon which compensation ought in general to be assessed. These are lucidly set forth by Lord Wensleydale in the *Caledonian Railway Company* v. *Lockhart* (1); but as the noble and learned Lord pointed out, those principles "do not apply where, by the express terms of the special Acts, compensation for damages from time to time sustained is payable."

I have not been able to see any answer to the analysis by Fry L.J. of the provisions of sect. 25, and with a single exception as to the apprehended injury (with which I have already dealt and which is peculiar to the Waterworks Act), the construction put upon the equivalent section in *Whitehouse* v. *Wolverhampton Railway Company* (2) seems to me to be by no means favourable to the argument for the appellants here. Kelly C.B. in that case said: "We must take it, therefore, that the mines were, at the time of the award, actually being worked to a point where they were intercepted by the defendants' line. This then is a case where the railway company have stopped the mine and rendered it necessary for the plaintiffs to sink a new pit in order to work the north side, and we must conclude that the expense of sinking it was about to be incurred, and was within the words of sect. 81, as being an additional expense or loss which would be incurred by the mine-owner by reason of the severance of the lands." I think the facts as they are assumed for the purpose of the judgment furnish a very good example of the interruption to the working of the mines which the statute intended to provide for.

On the whole, I am unable to concur with the Master of the Rolls and the two learned judges of the Queen's Bench Division in the view that any present injury now exists in respect of which the compensation claimed is due. The mine-owner has not been stopped under the powers of the Act. No compensation, I think, for injuriously affecting can at any time be demanded under the 6th section, since I think all rights of compensation are exhaustively dealt with under the mining sections; and I think all sense of injustice to the mine-owner is relieved when one considers that the decision is not one which finally determines the relations between the mine-owners and the undertakers.

(1) 3 Macq. 808, 825. (2) Law Rep. 5 Ex. 6.

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When the mine-owner does work, when an interference with the mining operations is actually made, then I think he will be entitled to litigate that question and claim compensation; but until that contingency arises—and I think it has not yet arisen—he has no claim.

I think the arbitrator has very tersely and accurately stated the question. "(1.) Whether by virtue of the Waterworks Clauses Act, or of the Lands Clauses Act, or otherwise, the claimants are entitled upon this arbitration to claim and to recover compensation for the prospective prevention of the working of more than 50 per cent. of the cannel and black coal within the area edged orange on the annexed plan."

It will be observed it is not present prevention from apprehension of prospective damage, but prospective prevention. This is a thing for which I think the Act makes no provision, for reasons which I have already suggested and upon which I think it unnecessary to enlarge.

Under these circumstances, I am of opinion that the judgment of the Court of Appeal ought to be affirmed and this appeal dismissed with costs.

LORD WATSON:—

My Lords, this case involves a question of some nicety, arising upon the construction of the 6th and Mines Clauses of the Waterworks Clauses Act of 1847.

The appellants are tenants of a mineral field containing four seams of coal, under two leases, each for a term of forty years, the one commencing from the 1st of August 1872 and the other from the 2nd of February 1873. They are under obligation to work out the whole of these seams during the currency of the leases, failing which, to pay rent or lordship in respect of the coal left unworked. Such portions of the surface as they may find it convenient to occupy for sinking pits, erecting miners' houses, making roads and railways, and other mining purposes, are demised to them during the respective periods of their leases.

The respondents having in the year 1880 obtained a special Act for supplying water to the borough of Wakefield, acquired

from the owners fifty-eight acres of land within the limits of the appellants' mineral leases, for the purpose of constructing a reservoir. On the 19th of June 1883 the appellants gave notice of their intention to commence working out all four seams of coal below and around the site of the reservoir. The respondents, at the same date, served a counter-notice requiring the appellants to repeat the notice of their intention to work, when they had in course of working the seams reached the limit prescribed by sect. 22 of the Act of 1847. On the 1st of November 1883 the respondents gave notice in terms of the Lands Clauses Act, to treat for the purchase of (1.) 35A. 3R. 24P. of the Middleton Deep Main, which is the lowest of the four seams, and (2.) all the appellants' right and interest, as mineral tenants, in the surface of the fifty-eight acres already acquired from the owners. The statutory arbitration which followed devolved upon the umpire, who issued his final award in the shape of a special case for the opinion of the Court.

The award fixes the compensation due to the appellants in respect of the surface interests and minerals actually taken from them at £8287; and as to that sum no question has ever been raised. At the date of the notice to treat, the appellants were making preparations to sink a pit, on a convenient site within the fifty-eight acres, for the purpose of working the two upper seams of coal; and the arbiter has found that the increased cost of sinking a shaft in a suitable place outside that area will be £150. The respondents do not now dispute that the appellants are entitled to present payment of that sum also. The argument addressed to us was confined to the third finding, which relates to the injurious effect which the construction of the statutory works contemplated by the respondents may have upon the future working of the seams of coal which were not included in the notice, and no part of which has been acquired by the respondents.

In dealing with this last claim, the arbiter has of course assumed that the thirty-five acres of the Middleton Main Seam, which the respondents have taken, will remain in situ, for the purpose of giving subjacent support to the reservoir. On that assumption, he has found that the appellants will be unable to work out

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more than 50 per cent. of the Cannel seam, which is the seam nearest to the surface, with safety to their mines; and that a prudent lessee working without right to compensation, would not work or get more than that proportion of the coal below or within twenty yards of the reservoir. He has further found, that, if such proportion of the upper seam be left undisturbed, the working of the three lower seams will not be injuriously affected by the construction of the appellants' waterworks; and has assessed the compensation due, upon that footing, at £4777. At the date of the award, the three lower seams had been partly worked by the respondents; but they had not begun to work the Cannel seam.

The 6th section of the Waterworks Clauses Act, which incorporates the provisions of the Lands Clauses Act, empowers the undertakers to use these provisions for the purpose of taking compulsorily such interest in "lands and streams" as they are authorized to acquire by their special Act, upon the condition of their making full compensation to owners and occupiers, and other parties interested in the lands or streams taken or used, or injuriously affected by the construction or maintenance of the authorized works. Sects. 18 to 27 inclusive apply to "mines," and, with the notable exception of sect. 27, their provisions are strictly analogous to, if not identical with, those of the corresponding clauses in the general Railways Clauses Acts of 1845.

It was argued for the appellants that, inasmuch as the respondents have taken by compulsion not only their interest in the surface, but a portion of one of their coal seams, under the powers of sect. 6, the conditions of that clause must be followed out, and all their claims for injurious affection of the seams not taken settled now. Alternatively, it was maintained that their right to compensation for prospective injury to their mineral workings, from the construction and maintenance of the reservoir, has already emerged, under the Mines Clauses of the statute. On the other hand, it was contended for the respondents that compensation in respect of unworked minerals, not taken under sect. 6, is exclusively regulated by the Mines Clauses, and that no claim arises to the mineral tenant, under these clauses, until,

in the ordinary course of mining his workings have approached the reservoir and have reached the prescribed limit.

In the Divisional Court, Mathew J. and Cave J. gave judgment for the appellants. They dealt with the claim as one falling under the Mines Clauses, and held that it was made competent by the provisions of sect. 25, being of opinion, on the authority of *Whitehouse* v. *Wolverhampton Railway Company* (1) that the damage, though prospective, was ascertainable with reasonable certainty, and might therefore be claimed now. In the Court of Appeal, Lord Esher M.R. agreed with these learned judges both in their reasoning and their conclusion; but the majority of the Court, consisting of Fry and Lopes L.JJ., reversed their order, on the ground that no claim in respect of minerals which, at some future time, it might be necessary to leave unworked, was competent before the seam was actually worked and the workings had reached the statutory limit.

In the course of the argument the question was mooted whether the word "lands," as it occurs in sect. 6 of the Waterworks Act, includes minerals. I think it is clear that the word is there used in its widest sense, and that the undertakers have the power to acquire subjacent minerals as well as surface, when their acquisition is necessary for the support of the authorized works. The point appears to me to be placed beyond doubt by the observations of the Lord Chancellor (Earl Cairns) in *Smith* v. *Great Western Railway Company* (2). Although it authorizes waterworks undertakers to acquire minerals when necessary, I do not think the legislature, by sect. 6, intended to enact that compensation in respect of other minerals, which at some future time it may be found necessary to leave unworked, should be immediately ascertained and paid. The Mines Clauses are, in my opinion, equivalent to an exception (even in cases where minerals are taken) from the provisions of sect. 6, with respect to compensation. These clauses are framed in general terms, and appear to me to be applicable to the case of all minerals, save those which are expressly purchased and conveyed to the undertakers. There may, however, be injury to works connected with mining operations, so directly and immediately occasioned by the taking of

(1) Law Rep. 5 Ex. 6.
(2) 3 App. Cas. 180.

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the surface, or of interests in the surface, that the mine-owner will be entitled to have compensation made to him, at the same time when the value of his interest in the surface is ascertained. Of that class of injuries, the claim of the appellants in this case, in respect of loss arising from their being compelled to sink a pit outside of the fifty-eight acres, affords an apt illustration. But the only claim with which we have to deal is for the value of coal forming part of a seam which the appellants have not begun to work, which the arbiter has found that they will, after they begin working, be unable to remove along with the rest of the seam without endangering not only the reservoir, but their own mines.

Whitehouse v. *Wolverhampton Railway Company* (1), relied on by the learned judges of the Divisional Court, does not appear to me to support the inferences which they derived from it. All the claims sustained by the Court of Exchequer were of the same nature as the claim made by the appellants in consequence of their being compelled to alter the site of the pit they were about to sink. In that case the mine-owner was in course of working a continuous seam of coal, when the railway company took a narrow strip of surface which intersected his mineral field. His workings had been confined to the south side of the strip, but were rapidly approaching the north side; and he was about to sink two additional pits in order to get the coal on the north. The intended site of one of these pits was in the centre of the railway strip, and had been selected because it could be worked by the engine of an existing pit on the south; and the mine-owner had already acquired the right to lay spoil on an area beside the site. In consequence of the site being taken by the railway company, he was under the necessity of sinking the pit in a position from which it could not be worked by the engine of the old pit, and of acquiring other land for the deposit of the spoil; and in these circumstances, he claimed and was allowed (1.) the expense of engine and plant for the new pit; (2.) the extra expense of working the engine; (3.) the expense occasioned by change of site; (4.) extra expense of raising pit frames and depositing spoil; and (5.) the cost of providing new land for spoil.

(1) Law Rep. 5 Ex. 6.

These were the only items in dispute, no claim being made in respect of minerals to be left unworked.

Had the present claim been preferred by the appellants against a railway company, under the provisions of the Railways Clauses Act, I see no reason to doubt that it would have been held to be premature. The difficulties which beset the case appear to me to be wholly due to the particular use which the respondents are authorized to make of the surface which they have acquired. In the case of a railway, the working of the subjacent minerals is frequently attended with certain danger to the line, but seldom, if ever, involves peril to the mine. When the overlying surface is occupied by a large reservoir of water, the results are very different. Injury to the reservoir, from the working of mineral seams below or near it, means the risk or certainty of flooding the mine; and the owners of the mine, and the undertakers interested in maintaining the reservoir, have a common interest to secure the safety of both. The mines sections of the Railways Clauses Act were apparently framed with the view of enabling railway companies to protect their lines from the destructive effects of subsidence of the surface, by giving them the opportunity of putting a stop, in whole or in part, to the working of subjacent seams of mineral, upon payment of compensation.

I come now to the Mines Clauses of the Act of 1847, upon the true construction of which the asserted right of the appellants to present compensation appears to me to depend. It is not necessary, and it is not my intention to express any opinion upon the effect of these clauses, except in so far as they bear upon the time at which a claim of compensation for minerals, which it may become necessary to leave unworked, for the protection either of the reservoir or of the mine, can be competently made. Because, after all, the question between the parties is one of time. The respondents do not dispute that they must ultimately compensate the appellants for all injuries occasioned to their mines by the construction and maintenance of the reservoir; but they object that no such injury as that for which compensation is sought has yet arisen, within the meaning of the statute.

Sects. 22 and 23, which are expressed, mutatis mutandis, in the same terms with sects. 78 and 79 of the English Railways

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Clauses Act, make it incumbent on the mine-owner to give thirty days' notice of his intention to work minerals below, or within forty yards' distance of, the reservoir. If the undertakers have not within that period, or at any time before the minerals are actually taken out (1), signified their desire that the minerals, some or all of them, shall be left in situ, and their willingness to make due compensation, he may proceed to work them. The provisions of sect. 26, which enable the undertakers to inspect the workings for the purpose of discovering the distance which they have reached, and their probable effect upon the stability of their reservoirs or other works, indicate the intention of the legislature that, in cases where the subjacent minerals are part of an extensive seam, the undertakers shall not be called upon to elect between retaining the minerals and permitting them to be worked until an inspection of that kind has become possible. I am, therefore, of opinion that the appellants are not in a position to prefer a claim for compensation under these clauses.

The enactments of sect. 25, so far as they bear upon the question before us, are to the effect that the undertakers shall, "from time to time," pay compensation to the owner, lessee or occupier of the mine "for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the said works, or by reason of such apprehended injury from the working thereof *as aforesaid*." These enactments are, in my opinion, adverse to the argument of the appellants. They refer back to the clauses already noticed, for ascertainment of the unworked minerals in respect of which compensation is to be paid; and the provision that payment shall be from time to time indicates, not that the whole claim of the mine-owner is to be ascertained and paid upon an estimate formed before working has begun, but that compensation is to be made as often as, in the course of working, and after there has been an opportunity of examining the workings, the undertakers notify their desire that minerals shall be left unworked.

Sect. 27 has no parallel in the Railways Clauses Acts; and was obviously intended by the legislature to afford the mine-

(1) See *Dixon* v. *Caledonian, &c., Railway Companies* (5 App. Cas. 820).

owner protection against a reservoir or other waterwork, which he does not require in the case of a railway line. It enacts that, "Nothing in this or in the special Act shall prevent the undertakers from being liable to any action or other legal proceeding to which they would have been liable for any damage or injury done or occasioned to any mines by means or in consequence of the waterworks, in case the same had not been constructed or maintained by virtue of this or the special Act."

I do not think that sect. 27 was meant to supersede the other clauses of the Act, in cases where a full remedy is provided by these clauses; but I am of opinion that it was intended, and is sufficient, to cover every case of injury to mineral workings, in which the mine-owner would otherwise have been deprived of a legal remedy. In such a case, the undertakers cannot set up the plea that their works were constructed under statutory authority. The case of a mine-owner who, at a distance of fifty yards from a reservoir, finds that he cannot push his workings farther in its direction, without serious risk of discharging its contents into his mine, is not, in my opinion, within sects. 22 and 25, but is certainly within the provisions of sect. 27. Injury is done to the mine by the reservoir whenever, in due course of working, the minerals or part of them become either unworkable to profit, or altogether unworkable, by reason of the flooding which must accompany the working. Whenever that state of matters occurs, the mine-owner may, in my opinion, bring his action for removal of the nuisance, with the alternative of pecuniary damages, if the undertakers prefer not to remove it. The Act of 1847 is an imperial one, and as the remedy would be open to a Scotch mine-owner in these circumstances, I can see no reason why it should be denied to an English mine-owner. But there is no present injury to the appellants' mines; and it appears to me that they have no cause of action under sect. 27, until there is actual injury, in the sense which I have suggested. It is manifest that if compensation were given under that clause to mine-owners whose workings and whose damage are prospective merely, in many cases, nay, in the present case, the cause of damage might be partly or wholly removed before there was actual injury.

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For these reasons, I am of opinion that the order appealed from ought to be affirmed.

LORD HERSCHELL (after stating the facts as given above, proceeded as follows):—

The question thus raised is, to my mind, one of very considerable difficulty; and it is not without much consideration that I have arrived at the conclusion which I am about to state to your Lordships.

I do not feel the same difficulty as was expressed by the Court below in holding that the word "lands" in sect. 6 of the Waterworks Clauses Act, 1847, includes "mines." By the definition clause (3), the former word includes "tenements, hereditaments, and heritages of any tenure"; and I think this language is large enough to cover mines. I should, therefore, but for the 18th and following sections of the Act, be prepared to yield to the contention of the appellants. It cannot, I think, be denied, that these sections constitute a special code relating to mines and their working, and to interference with them, which was intended in general to regulate the respective rights of mine-owners and the undertakers in relation to the construction and maintenance of waterworks. And the question, as it appears to me, is whether these enactments were not intended exclusively to regulate those rights, so far at least as the compensation to be paid by the undertakers, other than for minerals taken and damage consequent thereon, was concerned, and thus exclude claims for compensation which might perhaps otherwise have been made good under sect. 6. The sections in question are introduced by the words, "And with respect to mines, be it enacted as follows." The object of these sections appears to me to be that the undertakers should not be under the obligation of buying any minerals which were not necessary for the construction of their works, and which might never be wrought by the owners so as to interfere with them, but should be in a position, if the winning of the mines approached so near their works as to endanger them, to prohibit the removal of the minerals, whose support was requisite for the security of the works, on the terms of paying compensation to the mine-owner. With this view it is provided that the minerals

shall not be gotten within the prescribed distance of the works without due notice being given to the undertakers, so as to enable them to take advantage of the power conferred upon them to prohibit mining within the prescribed distance.

But for the fact that mining in the neighbourhood of the undertakers' works, without leaving sufficient support for them, would not only imperil the existence of those works, but might be a source of danger to the mine itself by letting in the water and flooding it, I should have no hesitation in arriving at the conclusion that the intention of the legislature was that no compensation in respect of such restraint upon the working of the mines as might be necessary for the support of the works, should be recovered until the mining approached within the prescribed distance of those works, and in respect of such minerals as the undertakers considered must be left for the safety of their works. But the difficulty as regards this particular description of undertaking arises from the fact that, whereas in general the mine-owner is sufficiently protected by being left to win his minerals as he pleases if the undertakers will not compensate him for refraining from working, in the case of waterworks he may bring disaster on his mine if he continues to work. It is true that by sect. 27 the same right of action is reserved to him for damage occasioned to his mines by the waterworks as he would have had if they had not been constructed or maintained under Parliamentary authority; but it is urged with force that this can hardly be said to be an absolute protection to the mine-owner.

I fully feel the weight of the arguments urged before your Lordships by the appellants; but, on the other hand, I find it impossible not to be impressed by the fact that the legislature, in a Waterworks Act, has enacted this code relating to mines, and has added to it a reservation of rights of action, which is not to be found in the similar mining clauses contained in the Railways Clauses Acts. And I think it will be seen, when the matter is carefully considered, that there is insuperable difficulty in the way of sustaining the right to the compensation claimed, and, at the same time, giving due effect to the provisions relating to mines, at least without involving the risk of serious injustice.

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The arbitrator here found that if the undertakers purchase and retain in situ the thirty-five acres of the Middleton seam, for which they gave notice, and no other coal in that or any other seam, the appellants could not safely get more than fifty per cent. of the cannel and black coal under the reservoir and within twenty yards of its boundary, and he assessed compensation upon this basis. What, the respondents ask, is to happen when the mine-owner's workings come within the prescribed distance, and he gives statutory notice of his intention to work? Are they to be bound to compensate him as if he had already received nothing in respect of a limitation of his mining rights? And if they are content that he should work the 50 per cent. which the arbitrator considered might be worked with safety, what means are there of compelling him to refrain from working the residue? These considerations do not, owing to the statement of facts by the arbitrator, present to my mind an insuperable difficulty in the peculiar circumstances of the present case. There is more force in the objection that the effect of the award is to withdraw from the undertakers the determination what seams should be worked and what left for the support of their works, and to transfer it to the arbitrator, whereas they, by selecting different seams, might, perhaps, have afforded the required support as effectually and more economically. And, moreover, the result is to compel payment at once on the basis that workings will be interfered with which might never be undertaken. Whether these considerations would be sufficient to conclude the case against the appellants if an award under the statute would always shew on its face the basis on which the arbitrator had assessed compensation and the minerals which he had assumed must be left for the support of the surface, it is needless to inquire. The argument of the appellants appears to me to lose sight of the fact that the statute does not compel any such course. The statement was only made in the present case to raise a legal point. An arbitrator assessing compensation under sect. 6 would be under no obligation to shew on the face of his award the mode in which he had arrived at the sum assessed, or the basis on which he had proceeded. And there would, I think, be no mode of compelling him to do so. All that the award would

shew would be that he had assessed a certain amount of compensation as due to the claimants. It is necessary to bear this in mind in considering the appellants' contention, and to see how it would work in the ordinary case. Suppose after a sum has been awarded and paid to the mine-owner as compensation, he approaches with his workings the prescribed distance, and gives the undertakers the statutory notice. What means would there be of ascertaining how much of the minerals the arbitrator had contemplated must be left when assessing compensation, or of restraining the mine-owner from working the minerals in respect of the necessity for leaving which he had been paid, or of securing that he was not paid a second time in respect of the same minerals? Resort, it may be said, could be had to the evidence given before the arbitrator, but this would probably have been conflicting, and the arbitrator may not be in a position, even if inquiry of him were legitimate, to afford the information. These considerations appear to me strong to shew that the legislature intended such questions of compensation as that which is in controversy in the present case, to be dealt with exclusively under the special enactments relating to mines.

And I think the real answer to the difficulty suggested by the appellants, which I admit to be a weighty one, is this, that the legislature may have thought that the self-interest of the water-works owners would be calculated to insure their securing sufficient support for their reservoirs and other works, and that this, coupled with the provision that nothing in the Act should prevent their being liable "to any action or other legal proceeding to which they would have been liable for damage or injury occasioned by their works if these had not been constructed under the authority of Parliament," was a sufficient security for the mine-owner.

I ought to add a word or two with reference to clause 25. Supposing that clause to be applicable to such a case as the present, I do not think the time has yet arrived for assessing compensation under it. The earlier words of the section certainly seem to limit somewhat narrowly the later provisions. But the clause is clumsily and inartificially drawn, and it is possible that these latter words may be capable of a broader construction than that

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which at first suggests itself. I do not think this clear enough to rest my judgment upon it, though it would to my mind get rid of all difficulty if such a construction could be adopted. All that I desire to do is to express no opinion which could preclude the contention hereafter, that if the mine would be endangered by the working of the minerals, and the respondents refuse to make compensation under the earlier sections, it may be claimed under this one.

Upon the whole, I feel constrained to the conclusion that the judgment appealed from ought to be affirmed.

LORD MORRIS :—

My Lords, I am of opinion the word "lands" in sect. 6 of the Waterworks Clauses Act, 1847, includes "mines;" but I am also of opinion that the Mines Clauses of the same Act, sect. 18 and following sections, must be held to govern the rights of undertakers and mine-owners in relation to waterworks undertakings. I am further of opinion that sect. 25 does not include an injury to the mines apprehended by the mine-owner such as present compensation is sought for in this case by him.

The reasons for arriving at these conclusions were so clearly and fully set forth in the judgments of my noble and learned friends Lord Watson and Lord Herschell, which I have had the advantage of reading, that I found I could not add anything. I concur that the order appealed from should be affirmed.

Upon the application of Sir *R. Webster* A.-G. for the appellants, the question of costs arising under sect. 34 of the Lands Clauses Act 1845 was reserved for argument. The Court of Appeal, being of opinion that the costs in the Divisional Court and in the Court of Appeal were incidental to the arbitration, had made no order as to costs (1).

Order of the Court of Appeal affirmed and appeal dismissed: The question of costs reserved for argument at the Bar.

Lords' Journals 15th December 1890.

(1) 20 Q. B. D. at p. 721.

The parties having afterwards agreed as to the costs, that question was not argued; and upon a petition of the appellants (consented to by the respondents) it was ordered that each party pay their own costs in the appeal.

Solicitors for appellants: *Williamson, Hill & Co., for T. & H. Greenwood Teale, Leeds.*

Solicitors for respondents: *Torr, Janeways, Gribble, & Oddie, for Stewart & Sons, Wakefield.*

[HOUSE OF LORDS.]

THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND . . . . } APPELLANTS;

AND

VAGLIANO BROTHERS . . . . . RESPONDENTS.

Bill of Exchange—Estoppel—Negligence—Banker—Forgery of Name of Payee—Payee "a fictitious or non-existing person"—Knowledge of Acceptor—Fictitious Bill—Bills of Exchange Act 1882 (45 & 46 *Vict. c.* 61) *s.* 7 *sub-s.* 3.

The effect of sect. 7 sub-s. 3 of the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61) is that a bill may be treated as payable to bearer where the person named as payee and to whose order the bill is made payable on the face of it is a real person but has not and never was intended by the drawer to have any right upon it or arising out of it; and this is so though the bill (so called) is not in reality a bill but is in fact a document in the form of a bill manufactured by a person who forges the signature of the named drawer, obtains by fraud the signature of the acceptor, forges the signature of the named payee, and presents the document for payment, both the named drawer and the named payee being entirely ignorant of the circumstances.

A series of documents so manufactured were made payable at the acceptor's bank, and the amounts were paid over the counter to the forger or his agent by the bank bonâ fide and in pursuance of letters of advice signed by the acceptor, whose signature thereto was fraudulently obtained by the forger, a clerk in the employment of the acceptor:—

Held, that the bank was entitled to debit its customer, the acceptor, with the amounts, although paid to the forger or his agent and not to a bonâ fide holder of the documents for value or to any person who could sue the acceptor upon them:—

By Lord Halsbury L.C. and by Lords Watson, Herschell, Macnaghten, and Morris, on the ground that the named payee was a fictitious or non-

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existing person within the meaning of the Bills of Exchange Act 1882 (sect. 7 sub-s. 3) and that the documents might be treated as bills payable to bearer; also

By Lord Halsbury L.C. and by the Earl of Selborne and Lords Watson, and Macnaghten for reasons turning on the conduct of the parties.

The decisions of Charles J. (22 Q. B. D. 103) and of the Court of Appeal (23 Q. B. D. 243) reversed on the above grounds.

Held, contra by Lords Bramwell and Field that a banker cannot charge his customer with the amount of a bill paid to a person who had no right of action against the customer, the acceptor: that the payee was not fictitious or non-existent, and that the documents could not be treated as bills payable to bearer within sect. 7 sub-s. 3 of the Act; that the conduct of the parties did not entitle the bank to debit the acceptor with the amounts; and that the decisions below ought to be affirmed.

APPEAL from a decision of the Court of Appeal (Cotton, Lindley, Bowen, Fry, and Lopes L.JJ., Lord Esher M.R. dissenting (1)) which affirmed the decision of Charles J. (2).

The facts are fully stated in the report of the decision of Charles J. and are also discussed in the judgments in this House. The arguments—all or most of them—also appear from the judgments, but the following short account may be useful to some readers.

1890. June 16, 17, 19, 20, 23, 24, 26, 27. Sir *R. Webster* A.G. and *H. D. Greene* Q.C. (*E. H. Pollard* and *R. M. Bray* with them) for the appellants:—

The bank has a good defence to this action both under the Bills of Exchange Act 1882 s. 7 sub-s. 3 and by estoppel or conduct. The Court of Appeal proceeded on *Robarts* v. *Tucker* (3), but that case does not apply. There there was a real payee named by a real drawer, payment to whom or to whose order alone could have enabled the acceptor to charge the drawer. Here there was no real drawer or payee, nor any person payment to whom or to whose order would have enabled the acceptor to charge the supposed drawer.

The only person entitled to name the payee of a bill is the drawer. The acceptor contracts to pay the person named by the drawer and authorizes his banker to pay accordingly. In the present case there was no genuine transaction in respect of which

(1) 23 Q. B. D. 243. (2) 22 Q. B. D. 103. (3) 16 Q. B. 560.

the bills were drawn: no genuine drawer or payee: the bills were a sham from beginning to end. Vagliano by accepting is estopped from denying the validity of the drawer's signature, but the forger of a drawer's name is not a legal drawer and cannot make of the nominal payee a genuine payee. C. Petridi & Co., the supposed payees, had no interest in the bills, no right to indorse them or be paid upon them: no person had any such right; and Vagliano, who had no right to require any one's indorsement, gave the bank authority to pay the bearer, there being no person who could have a better title. It is immaterial that C. Petridi & Co. were real people; they were none the less fictitious payees of these bills, having no interest in the bills. This being so the bills must be treated as payable to bearer under the Bills of Exchange Act 1882 s. 7 sub-s. 3 which enacts that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." The Court of Appeal held that "fictitious" meant "to the knowledge of the acceptor," but where is the warrant for adding these words? The knowledge of the acceptor cannot make the payee more or less fictitious. Such a construction is inconsistent with the scheme of the Act, and on this point sect. 3 sub-s. 1, sect. 5, sect. 10 sub-s. 2, sect. 17, sect. 22 sub-s. 2, sect. 29 and sect. 41 sub-s. 2 should all be looked at. A holder of one of these bills, who had given value for it without notice, could have sued Vagliano on it, and the bank would therefore have been discharged by paying to such a holder. The bank is not the less discharged by paying without notice a holder who became possessed of the bill by fraud. The use of a real name owned by one or more people does not turn a fictitious payee into a real payee: *Stone* v. *Freeman* (1); *Collis* v. *Emett* (2).

The Court of Appeal reviewing some of the cases upon fictitious payees prior to the Act of 1882,—viz.: *Gibson* v. *Minet* (3); *Gibson* v. *Hunter* (4); *Mead* v. *Young* (5); *Bennett* v. *Farnell* (6); *Cooper* v. *Meyer* (7);—held that before the Act a bill made payable

(1) 1 H. Bl. 317, n.
(2) Ibid. 313.
(3) Ibid. 569, 588.
(4) 2 H. Bl. 187, 288.
(5) 4 T. R. 28.
(6) 1 Camp. 130, 180, c.
(7) 10 B. & C. 468.

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to the order of a fictitious payee could be treated as payable to bearer as against the acceptor or other person liable where the acceptor or such person knew the payee to be fictitious. But the above cases do not establish that proposition, and even if they did the Act of 1882 has left out the words "to the knowledge of the acceptor," and the omission is significant. The law before the Act is not as the respondents contend. See *Phillips* v. *Im Thurn* (1). There the acceptor upon protest of a bill for the honour of the drawer was held estopped from alleging in answer to an action by the indorser that the payee was fictitious and that he (the acceptor) was ignorant of that when he accepted it. See also *London & South-Western Bank* v. *Wentworth* (2).

Further, the conduct of Vagliano precludes him from saying that these payments were not made by his authority. But for his negligence these bills would never have come into existence. With a proper system of supervision Glyka's frauds must have been discovered. Vagliano was bound to know the signature of his customer Vucina: his act in mistaking the forged for the real signature of Vucina was the real cause of the loss. Moreover the payments by the bank were made in pursuance of Vagliano's letters of advice giving the dates, numbers and amounts of the bills which were coming forward. Of the two innocent persons Vagliano ought to suffer, his negligence being the cause of the loss. In such an action the plaintiff ought not to recover unless it is against conscience for the bank to retain the money: *Price* v. *Neal* (3). The bank have simply acted without negligence as Vagliano's agents in paying, having been induced to pay by his conduct. Vagliano's conduct brings the case within the principle of *Young* v. *Grote* (4). As to *Bank of Ireland* v. *Evans* (5), the seal of the corporation was affixed in fraud and without the knowledge of the corporation. The present is a much stronger case: Vagliano himself signed the bills and sent them out. Neither in that case nor in *Mayor, &c. of Staple of England* v. *Bank of England* (6) did the facts

(1) 18 C. B. (N.S.) 694; Law Rep. 1 C. P. 463.
(2) 5 Ex. D. 96.
(3) 3 Burr. 1355.
(4) 4 Bing. 253.
(5) 5 H. L. C. 389.
(6) 21 Q. B. D. 160.

resemble those in the present case. Here the negligence, or conduct, of Vagliano was the proximate cause of the loss, and he is therefore estopped: *Swan* v. *North British Australasian Co.* (1) See also *Baxendale* v. *Bennett* (2); *Arnold* v. *Cheque Bank* (3); *Halifax Union* v. *Wheelwright* (4); *Orr* v. *Union Bank of Scotland* (5); *Ireland* v. *Livingston* (6). The Court of Appeal seem to have held that the bank were negligent in paying the bills across the counter instead of through a banker; but how could they refuse payment? Nor if it were negligence could it be set off, as the Court of Appeal seem to have held, against the negligence of Vagliano.

Lastly, the pass book with the entries of these payments, and the bills themselves, were returned to Vagliano half yearly. He kept the bills and returned the pass book without objection. This amounted to a settlement of account, primâ facie at all events: *Commercial Bank of Scotland* v. *Rhind* (7).

Sir *C. Russell*, Q.C. and *Finlay*, Q.C. (*Hollams* with them) for the respondents:—

The Act of 1882 has no direct and only an incidental relation to this question. Sect. 7 sub-sect. 3 applies only to real bills, which these are not. The law prior to the Act is correctly stated in Story on Bills, ss. 56, 200, cited in the judgment of the Court of Appeal. (8) It is the assent of the acceptor which alone could estop him from denying that the bill was payable to bearer. That is the test; not the intention of the drawer. This was established by *Gibson* v. *Minet* (9); *Gibson* v. *Hunter* (10); and the other cases already referred to. And it is for the appellants to make out that the Act has altered the law. Where a principal authorizes his bankers as his agents to pay his acceptances, they are justified as against him in paying the person who can give a valid discharge. The authority is to pay according to the tenor of the bill, that is in the present case to the payees or their order. Here C. Petridi & Co., of

(1) 2 H. & C. 175, 182.
(2) 3 Q. B. D. 525.
(3) 1 C. P. D. 578.
(4) Law Rep. 10 Ex. 183.
(5) 1 Macq. 513.
(6) Law Rep. 5 H. L. 395.
(7) 3 Macq. 643, 651.
(8) 23 Q. B. D. 257.
(9) 1 H. Bl. 569.
(10) 2 H. Bl. 187, 288.

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Constantinople, were named as the payees. They were well known to Vagliano as old customers, and but for the fact of that knowledge Vagliano would not have accepted. They were real persons, as real as Vucina the drawer, and known to Vagliano to be so. The fraud of Glyka cannot turn them into fictitious persons. It has been argued by the appellants that C. Petridi & Co. had nothing to do with these bills and could not have indorsed them, and that a good title could not have been made. But that is not impossible. The indorsement of C. Petridi & Co. might have been procured by some clerk of their own acting in concert with Glyka. Or they might have bought the drafts (before acceptance) in order to remit money to London. Or lastly, they might have dishonestly indorsed the bills. In either of these three ways a good title could have been made. The appellants have therefore failed to shew that C. Petridi & Co. were "fictitious or non-existing" within the meaning of the Act. "A fictitious person" means a person who has never existed. "A non-existing person" means one who did exist but no longer exists. The words of the Act are not "a fictitious or non-existing payee," but "a fictitious or non-existing person," a material distinction. But assuming C. Petridi & Co. to be fictitious or non-existing persons, sect. 7 sub-s. 3, in saying that the bill may be treated as payable to bearer, means in the hands of a holder in due course, a lawful holder for value. The bank therefore is not discharged by paying Glyka who was not a holder in due course. That the legislature did not intend to protect banks in such a case as the present is shewn by sect. 60 which protects them in the case of cheques only. The object of the advice notes on which so much stress is laid by the appellants was simply that the bank might have money ready to meet the bills and to inform the bank that the acceptance was genuine and that Vucina was the drawer. The appellants insist that Vagliano represented to them that the bills were properly put into circulation. But suppose Glyka had obtained a genuine draft of Vucina's and had afterwards forged the payee's indorsement, it could have been said with as much truth that Vagliano had made that representation. Yet it would have been of no force, for in that case the payee would clearly

not have been fictitious. The case comes back therefore to the question whether the acceptor knew the payee to be a fictitious person. *Robarts* v. *Tucker* (1) applies to the present case, and the dicta of Maule J., during the argument, upon forged indorsements and as to the banker having a reasonable time to inquire whether an indorsement is genuine, are in favour of the respondents. As to negligence, Vagliano was not guilty of any negligence, at least of any which caused the loss: it was not negligence in or connected with the transaction. On the other hand the bank was guilty of negligence in paying such large sums over the counter instead of through a bank, and after the attention of one of the bank clerks had been directed to this very circumstance.

Sir *R. Webster* A.G., in reply:—

There is no authority for the obiter dictum of Maule J., that a banker has a reasonable time for inquiry into the genuineness of an indorsement.

Whether a payee is real or fictitious must depend on the intention of the drawer. If the drawer's name is forged and the bill is a fiction, there can be no real payee though the named payee be a real person. A banker takes the risk of the indorsements being forged on a genuine bill; but the Legislature cannot have intended to impose such a risk where the bill is forged.

The House took time for consideration.

1891. Mar. 5. LORD HALSBURY L.C.:—

My Lords, the simple question in this case is whether the plaintiff's bankers have paid away the plaintiff's money under such circumstances as enable him to refuse to acknowledge the payments as made on his behalf. Each of the parties is innocent of any wilful default. They are both free from any suspicion of bad faith; but the banker has paid away and placed to the debit of his customer a sum of £71,500, while the customer was not

(1) 16 Q. B. D. 576, 577, 578.

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conscious of and certainly never intended to authorize the payment of that sum on his behalf.

The authority to pay, which was relied upon by the bankers as justifying the payments, was written documents in the form of bills of exchange, and, though they were not really bills of exchange at all, it is important to bear in mind what a real bill of exchange would import to the mind of a person to whom it was sent for payment.

Now, apart from the particular machinery by which this transaction was effected, it will not be denied that a principal who has misled his agent into doing something on his behalf which the agent has honestly done, would not be entitled to claim against the agent in respect of the act so done; and upon this branch of the case the question is whether the agent was misled into doing the act by the default of the principal: see *Ireland* v. *Livingston* (1).

I will treat the transaction for the sake of clearness as if it were a single payment. Could it be doubted that if the two parties met, and by word of mouth the customer had said to his banker, "There is a bill coming due to-morrow of such and such an amount; it is drawn on me by a customer of mine named Vucina, and will be presented for payment at your bank to-morrow," that such a statement was calculated to put the banker off his guard and be likely to induce him to act as he did act? Does it make any difference that the words were not spoken, but upon its face the document, reaching the banker's hands by the act of the customer, in which phrase I include the course of Vagliano's business, said this as plainly as if the words had been spoken? Vucina, in fact, had not drawn any such bill. There was no transaction between Vagliano and Vucina such as the instrument in question purported to effect, and yet this was the written statement which upon the face of the instrument Vagliano made to the bank.

Further, by a separate and independent writing, Vagliano told the bank that such a bill of exchange for such an amount was becoming due, and would have to be paid out of his account. No such bill of exchange existed, although a false document corres-

(1) Law Rep. 5 H. L. 395.

ponding in all particulars was accredited by Vagliano in writing his acceptance upon it.

In estimating the effect upon an agent's mind, it must of course be remembered, that though I have here for clearness spoken of it as a single transaction, it is a transaction repeated forty-three times and spread over a considerable period. The false documents were paid, duly debited to the customer, and duly entered in his pass-book, and so far as the banker could know or conjecture brought to his knowledge on every occasion upon which the payment was made and the bills returned. Further, on each occasion when these false documents were, by what I have called the act of the customer, permitted to reach the bank for payment, they were accompanied with a considerable number of other genuine bills of exchange, many of them drawn by Vucina, and regularly entered in the notice of bills about to become due, together with the false documents in question.

My Lords, it seems to me impossible to dispute that this was, in fact, a misleading of the bankers. I pass by for the moment the question whose default it was, for the purpose of considering the proposition which has found favour with one of your Lordships, and which I will not dispute, that the carelessness of the customer, or neglect of the customer to take precautions, unconnected with the act itself, cannot be put forward by the banker as justifying his own default. In order to make the cases of the *Bank of Ireland* v. *Trustees of Evans' Charities* (1), and the *Mayor, &c., of Merchants of the Staple of England* v. *Bank of England* (2), authorities in this case, it would be necessary to assume that the plaintiffs in those cases had by some voluntary act of their own given credit and the appearance of genuineness to the particular powers of attorney which were forged in those cases, and if they had, I very much doubt whether the decision would have been what it was; but no such fact appeared; all the parties whose negligence was relied on had done, was to leave their seal carelessly in the custody of the person who abused his trust. These decisions therefore do not seem to me to touch the case.

But how can it be said in this case that the default is

(1) 5 H. L. C. 389. (2) 21 Q. B. D. 160.

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unconnected with the act? The very thing which the banker does is induced by the fault of the customer. Was not the customer bound to know the genuineness of Vucina's draft? Was not the customer bound to know whether there was any real transaction between himself and Vucina, effected by the instrument in question? Was not the customer bound to know the contents of his own pass-book? Was not the customer bound to know the state of his account with Vucina? It certainly is very strange that it should be suggested that without any responsibility on his part he should be entitled to accredit forty-three documents to his bankers as genuine bills when he had the means of knowledge I have indicated that no one of them was a bill of exchange at all, or represented any transaction between Vucina and himself.

The bankers paid upon these documents, and they paid a person who was not entitled to receive the money. There was no person entitled to receive it. The fact that it reached their hands as representing a mercantile transaction in which somebody was to be paid was itself a misleading of them; and that it did reach their hands purporting to represent such a transaction arose from the mode in which Mr. Vagliano's business was conducted by those responsible for it.

I have designedly avoided calling these documents bills of exchange. They were nothing of the sort. But if they had got into the hands of an innocent owner for value without notice, Vagliano would undoubtedly have been responsible upon them; for he had given them a genuineness as against himself by accepting them.

Now, when it is insisted that the bankers are responsible because they did not pay the person indicated as payee, one is induced to inquire whether Mr. Vagliano or any other merchant would have expected that any inquiry should be made as to the genuineness of Petridi's signature. Suppose they had been genuine signatures of Petridi and the bills had been dishonoured while the bankers were making inquiries, would not Mr. Vagliano have had grave ground for complaint against the bankers who had allowed his credit to be thus disturbed? I think each of the parties to the transaction must be taken to have known the ordinary course of mercantile affairs, and it is manifest that

no banker could hesitate to pay such bills as came to him, so accredited as they were by Mr. Vagliano's acceptance, without throwing the whole mercantile world into confusion.

I am not intending to throw any doubt upon the propriety of the decision in *Robarts* v. *Tucker* (1), nor am I prepared to assent to the proposition that it is a harsh decision. A customer tells his banker to pay a particular person; the banker pays some one else, and it would seem to follow as a perfectly just result that the banker should be called upon to make good the amount he has so erroneously paid. But what relation has such a decision to a case where a thing which bears the form and semblance of a known commercial document like a bill of exchange gets by the act of the customer into the hands of the banker, where there is no real drawer, no real transaction between himself and the supposed drawer, and where, as a matter of fact, there is no person who in the proper and ordinary sense of the word is a payee at all?

It seems to me that if all these circumstances, acting upon and inducing the bankers to make the payments they did make, are acts which are the fault of the customer, it is the customer and not the banker who ought to bear the loss. I think, under these circumstances, the banker did what was usual and customary with bankers, and what both customer and banker knew to be usual and customary with bankers, as far as the payment without inquiry as to the genuineness of the indorsement by Petridi & Co. was concerned. But I propose to deal separately with the alleged negligence of the bankers, or at all events the unusual course pursued by the bankers in cashing these bills across the counter and paying to the person presenting the document for payment without inquiry.

My Lords, I do not know what is the usual course among bankers, and I should doubt whether in such a matter it would be possible to affirm that any particular course was either usual or unusual in the sense that there is some particular course to be pursued when circumstances occur, necessarily giving rise to suspicion. I can well imagine that on a person presenting himself whose appearance and demeanour was calculated to

(1) 16 Q. B. 560.

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raise a suspicion that he was not likely to be entrusted with a valuable document for which he was to receive payment in cash, I should think it would be extremely probable that whether the document were a cheque payable to bearer for a large amount or a bill, the counter-clerk and banker alike would hesitate very much before making payment. However, I will assume the course pursued in this case to be somewhat unusual, and that this is proved by the bankers themselves, though the counter-clerk gives a different reason why the clerks called the attention of their immediate superior to the circumstance, and he in his turn called the attention of Mr. Vagliano's representative. In doing so it appears to me to have relieved the bankers from any accusation of having hastily or carelessly paid these bills. What could the bankers know of the particular transactions of Messrs. Vagliano? But Mr. Vagliano, when it was communicated to him or to his representative, would be surely the best person to judge whether there was anything calculated to give rise to suspicion in the facts to which I have referred.

My Lords, it has been sought to minimise the effect of that communication to Mr. Vagliano's representative, first by treating him as a clerk to whom such a communication ought not to have been made, and secondly, by suggesting that Mr. Ziffo possibly indicated that he was a person not fit to be trusted, since he took a very strange view of what was or was not calculated to cause suspicion and enforce inquiry as to these bills. But what had the bankers to do with Mr. Ziffo's capacity for business? He was Mr. Vagliano's confidential clerk, duly accredited as such. After one or two of the bills had been presented and paid in the manner I have referred to, Mr. Disney thinks it right to call the attention of Mr. Ziffo to the fact, and Mr. Ziffo replies to the information that they are presented over the counter and invariably taken in bank notes, "I suppose if they are properly advised you must pay them." Here is information given of the very fact relied on to the confidential representative of Mr. Vagliano, and it is suggested to be negligence in the bank that after receiving the answer I refer to they continued to pay these bills when properly advised by Mr. Vagliano himself.

I must add here that I think that the witness truly explained

his inadvertent use of the word "indorsed" and meant to say "advised." Now it appears to me that whatever case might be suggested against the bank is completely answered by the bank having communicated these facts to a person occupying such a position in Mr. Vagliano's house, and that his answer was such as to allay any suspicion or uneasiness on the part of the bank.

My Lords, I have not stopped to examine minutely the contrast between Mr. Ziffo's evidence and that of the bank's official, Mr. Disney, because if one comes to examine it carefully there is no real contradiction. One witness is positive as to communications actually made, and the other only meets that positive assertion by alleging a want of memory of any such communication.

One other point has been made at your Lordships' Bar, but I think under circumstances which do not entitle it to consideration. It is said that the course of post ought to have been known to the bankers, and that the date of the indorsements ought of itself to have raised suspicion. Possibly, if there was evidence sufficient to prove exactly what the facts are as to the course of post (and notwithstanding the evidence of one witness, I am not satisfied that we have the facts accurately as to the course of post), a serious doubt might arise; but it is enough to say, for the purposes of this case, that that point appears neither to have been pressed nor argued at a time when, by proper evidence, the matter could have been left beyond doubt, and the circumstances of excuse for not observing the dates, if such excuse existed, could have been properly determined. I can find no evidence that that point was really pressed. It is not noticed in any of the judgments, and though to my mind it is a singular argument coming from the mouth of Mr. Vagliano, whose suspicions one would have thought would have been aroused by the dates found on the documents afterwards appearing, it is enough for me to say that I decline to consider a topic which has been neither really argued nor properly fortified by evidence as a material circumstance to consider in this case.

My Lords, I should be content to rest my judgment here, and to express my opinion that, for these reasons, the judgment of the Court below should be reversed, although I regret to say that

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on this branch of the case my view is at variance with that of all the learned judges who have hitherto treated this question.

My Lords, I have hesitated long before I was able to acquiesce in the view of my noble friend Lord Herschell and that of the Master of the Rolls, that the same conclusion could be arrived at by a consideration of the Bills of Exchange Act, 1882.

My Lords, one difficulty I have had in the determination of that question is, in applying to the instruments with which I have been dealing an enactment which deals with bills of exchange. For reasons I have already given, it seems to me difficult to treat them as bills of exchange at all; but as against the person now insisting on their possessing the quality of such instruments, and remembering that it was his act by which they were put into circulation in that character, it does not seem unreasonable that, applying the doctrine of estoppel to him, one may consider whether as against him they may not possess qualities which, in their inception, they did not possess.

The 7th section, upon two of the sub-sections of which this question turns, commences thus: "(1.) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty." And the 3rd sub-section: "(3.) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer."

Now, in the first instance, before dealing with the application of these sub-sections to the facts in debate, I must say that I cannot acquiesce in the view which the majority of the Court of Appeal appear to have entertained, that they were at liberty to import into that 3rd sub-section, that it was a condition of its application that the acceptor should be aware that the payee was a fictitious or non-existing person.

It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed.

To return to the construction of the language of the two sub-sections—for I think both should be read together—it seems to me that what the legislature was enacting was in substance this: That where a bill was not payable to bearer, the person to whom payment was intended to be made was to be named or otherwise indicated upon the face of the instrument with reasonable certainty; but where there was no real payee, the bill might be treated as payable to bearer.

The language which the legislature has employed to express this law has been subjected to very minute verbal criticism. If the substance of the matter is looked at, and it is remembered that what the legislature was dealing with was what was to appear upon the face of the instrument, and contemplated the case of there being no one to whom payment could properly be made, no person on the face of the instrument having any rights under the bill, no person, therefore, capable of giving a discharge to the acceptor for having paid at the demand of the drawer, it would seem that the reason of the thing would apply equally to a real person whose name was forged as to a person who had no existence.

In truth, if strictly construed, the words "fictitious person" are a contradiction. One may pretend there is a person when there is not. One may assume a character which does not belong to one, but to satisfy the word "fictitious" as applicable to a person is assuming in one part of the proposition what is denied in the other. Some of the characters in Sir Walter Scott's novels may be fictitious in the sense that no persons so named ever lived; but if real names are taken, and events and conduct and character attributed by the writer to those real names, are the characters less "fictitious" because persons of those names identified with a totally different history and different qualities did in point of fact exist at one time?

One singular result of treating the section in the way that the Court of Appeal has adopted, would be that one must dive into the mind of the hypothetical forger to determine whether the character be fictitious or not; and this may be done, though it is not necessary to find the forger's intention from the language or anything that appears upon the face of the instrument itself, but

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you may judge from previous commercial transactions of the party who was likely to be meant as giving plausibility to the forgery. But if it can be alleged (as it can be here) that the forger selected a name which would give plausibility to his forgery, and be likely to deceive those into whose hands his forged instrument should come, that is not the name of a fictitious person, although that person had no power to deal with the bill, and was not in any respect the real payee, any more than if the name had been selected of a person who had never been heard of or existed before; whereas, if it is pure imagination, then it is the name of a fictitious person.

I have come to the conclusion that, however expressed, the real meaning of the sub-section is to imply the unreality of any person who is named upon the face of the instrument as the payee of the bill. The statute itself uses the phrase "payee." That cannot mean in truth the payee, because by the hypothesis there is no payee, and dealing, as the statute was, with the form of the instrument, and enacting that if a name which appeared as payee on the face of the instrument was a fictitious person, the bill may be treated as payable to bearer, it expressed in popular words, though perhaps not very felicitously chosen, its meaning accordingly.

For these reasons I am of opinion that on this ground also the judgment of the Court below was wrong and ought to be reversed, and I so move your Lordships.

EARL OF SELBORNE :—

My Lords, if the bills in question in this case had been genuine, really signed by Vucina in favour of C. Petridi & Co., and if the indorsements only had been forged, the case would have been governed by *Robarts* v. *Tucker* (1). But the signatures of Vucina were forged; the use of the name of C. Petridi & Co. as payees was part of the fiction; they were not in any true sense payees; and the bills were, nevertheless, accredited by the plaintiffs to the bank as genuine, and as coming forward, like other genuine bills of Vucina, for payment in due course, on days specified in the plaintiffs' letters of advice; and their

(1) 16 Q. B. 560.

payment, as such, was expressly directed by the plaintiffs. When I speak of the plaintiffs' letters of advice I do not forget that the effect of acceptances payable upon the face of the bills at the Bank of England might, perhaps, have been the same; but in this case there were both; and I think it unnecessary to consider whether the addition of the one form of direction to the other made any difference. If it did not, the effect of the letters of advice cannot on that account be less. This state of things appears to me to raise a question which was not decided in *Robarts* v. *Tucker* (1), or in any other case cited at the bar. It is (as *Robarts* v. *Tucker* (1) was) a question between the plaintiffs as principals and the bank as their agent, and not between any parties to the bills.

If the plaintiffs misled the bank upon a material point, however innocently, and although they were themselves deceived by the fraud which had been committed, I think that they, and not the bank, ought to bear the loss which has been the consequence. Here there was never any real holder of these bills, by whom they could have been indorsed, or any outstanding liability from which a discharge was necessary. Your Lordships have to deal with the case of an agent, not claiming any title to or interest in the bills, but instructed by his principal to pay them. It is convenient to speak of them as bills, but, properly speaking, they had not (though they seemed to have, and were represented by the plaintiffs as having) that character; they were accepted as such; but there was no real drawer, and no real payee; and they were never negotiated. It is not (as I understand) disputed that there might, as between banker and customer, be circumstances which would be an answer to the primâ facie case that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of those circumstances; the fact that there was no real payee might be another; and I think that a representation made directly to the banker by the customer upon a material point, untrue in fact (though believed by the person who made it to be true), and on

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which the banker acted by paying money which he would not otherwise have paid, ought also to be an answer to that primâ facie case. If the bank acted upon such a representation in good faith, and according to the ordinary course of business, and a loss has in consequence occurred which would not have happened if the representation had been true, I think that is a loss which the customer, and not the bank, ought to bear.

I should be of that opinion on general principles; and the application of those principles is fortified, to my mind, in this particular case, by the circumstances under which the forgeries were committed, and the facts that the plaintiffs had large dealings with Vucina going on at the same time with the forgeries, in the course of which they accepted many of his genuine bills, all which were in like manner accredited to and made payable at the bank; and that there were documents in the plaintiffs' possession (the true and forged letters of advice from Vucina and the forged bills themselves, when returned by the bank), from which, if attention had been paid to them, the fraud might have been discovered in an early stage.

I do not see how it can be open to dispute that it was material to the bank to know whether these were genuine or forged bills; or (subject to the consideration of some matters which I postponed) that, in paying the bills as they did without inquiry into the genuineness of the indorsements (which, for the present, I assume to have been regular upon the face of them), the bank acted in good faith, and according to the usual and practically necessary course of business; or that, if the bills had really been Vucina's, and if C. Petridi & Co. had been real payees, no loss would have been incurred. If it were the duty or the practice of bankers, without special reasons for suspicion, to refuse or delay payment of foreign bills appearing on their face to be regular, and regularly advised for payment by their customers, until they could ascertain by inquiry the genuineness of every foreign indorsement, it must continually happen that the bills would not be paid at the proper time and place, and bonâ fide holders might treat them as dishonoured. It was admitted that it is not in the ordinary course of business to make such inquiries; and I should say that business could not go on if it were so. No

doubt there is, in the ordinary course of business, the possible risk which occurred in *Robarts* v. *Tucker* (1), of a genuine bill being stolen and presented for payment with a forged indorsement. Between that case and one like the present there is this very substantial difference, that the acceptor in that case has not in any way contributed to mislead the bankers, and when there is a real bonâ fide payee the acceptor remains liable to him; but if when there is no such payee the person who signs as drawer indorses the bill with the name of a pretended payee there is no outstanding liability from which a discharge is needed for the acceptor's protection. The risk of a genuine bill being stolen and presented with a forged indorsement is one which, being of rare occurrence and distributed over a large amount of business, bankers may be willing to run. But they are entitled to judge for themselves what risks they will run; and the customer is not, in my opinion, entitled to tell the banker (in effect) that the risk is an ordinary one, and when it turns out to be otherwise to put upon him another, which, if the truth had been known, the banker with his eyes open would not have undertaken. When, as in this case, the customer accredits the bills as genuine and as coming forward in due course against him for payment on certain days, the banker must, I think, be considered to undertake the risk incident to bills of that description, and no more. If this would be true of a single bill, much more of a series of bills of large amount, all successively authenticated to the banker in like manner by the customer who orders them to be paid. The judgment under appeal puts upon the bank a risk which it never was called upon, and never agreed, to undertake.

It seems to me also clear (as a matter of fact, and without reference to the question under the Bills of Exchange Act) that the Constantinople firm of C. Petridi & Co. were never in any true sense payees of these bills, and their genuine indorsements would never have appeared upon them without an additional fraud. The suggestions at the bar, as to conceivable ways in which such indorsements might have been obtained, were in my judgment irrelevant to the real facts, with reference to which, and not to merely imaginable possibilities, this case ought to be

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determined. In *Stone* v. *Freeland* (1) and *Cooper* v. *Meyer* (2) a real firm, Butler & Co., and real person, Woodman, were named as payees; but the Courts did not hold that enough to make the firm or the person so named a real payee.

If the question were merely one of legal estoppel against the acceptor, it may be true that the estoppel would be only against denying the genuineness of the drawer's signature; or, if the acceptor knew that there was no real payee, against insisting that the bill must receive an indorsement which he knew to be impossible. But there are authorities, relevant as far as general principles are concerned, which, even as between parties to a negotiable instrument, seem to me to go beyond legal estoppel. I cannot but think it an extension of that doctrine to hold (as was done in *Cooper* v. *Meyer* (2) that when the bill is payable to the drawer's order, the acceptor (because he is supposed to know the drawer's signature) is bound by the subsequent indorsement of the person who forged the signature as well as by that original signature. And I am not convinced that estoppel is a sufficient explanation of the cases in which the drawer of a cheque has been held bound by fraudulent alterations for which the state of the paper afforded space. The drawer was ignorant of, and could hardly be held bound to anticipate, the subsequent fraud. But if it were universally true that the liability of an acceptor to a bonâ fide holder of a bill in all such cases depends upon legal estoppel, I do not think it would follow that the discharge of a banker or other agent employed by the acceptor to pay the bill must depend under similar circumstances upon that principle only.

If in the present case the plaintiffs, instead of making their acceptances payable at the Bank of England, had directed (in the same terms) a managing clerk in their own office, ignorant of the fraud, to pay those acceptances, and to take for that purpose the necessary money from their cash-box, and if the clerk so authorized had paid the bills exactly as the Bank of England did (not indeed to Glyka himself, but to some one acting for him and presenting them in any manner not irregular), I cannot doubt that the clerk so acting in good faith would have

(1) 1 H. Bl. 316, n. (2) 10 B. & C. 468.

been exonerated. A banker undertakes to do what is in the proper course of a banker's business, and so far differs from an agent who is not a banker; but beyond this I see no principle for putting him in a worse position than any other agent.

In *Bennett* v. *Farnell* (1), Lord Ellenborough held that when the payee was fictitious, and the acceptor did not know it, the bill was neither to order nor to bearer, but was completely void. If in such a case the acceptor had directed his bankers to pay the bill, and the bankers had paid it in good faith upon an indorsement regular upon its face, though fictitious in fact, the bankers would have been in my judgment entitled to credit in account for what they had so paid. Whatever might have been before the Bills of Exchange Act of 1882 the materiality of the acceptor's knowledge or ignorance on such a point as between himself and a bonâ fide holder of the bill, I should not have thought it material as between him and his bankers paying the bill under such circumstances. I have come to this conclusion without resting my opinion upon the Statute of 1882. Assuming the present case not to be expressly ruled by that statute, it is also (in my judgment) not ruled by any former authority. And I cannot but think that the statute so far as it does rule certain other cases in pari materiâ, and not well distinguished from this in principle, is as proper to be taken into account as any of the authorities which preceded it as to the acceptor's knowledge or ignorance where there is not a real payee.

But it was insisted that in paying these bills as they did the bank deviated from the proper course of business, and ought to be held affected with notice that the indorsements were fraudulent. The first point relied upon for that purpose was, that the bills, drawn as they were for large sums, were all presented and paid across the counter and not through any bankers. This was admitted to be "unusual" in the evidence for the bank; but it was not, as I read the evidence, either admitted or otherwise proved that it was irregular or sufficient in itself to excite a suspicion that there was something wrong, although it was unusual in the sense of not often happening. No authority was produced to shew that it was irregular according to the law

(1) 1 Camp. 130, 180, c.

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merchant; and if not, and if the payments were bonâ fide made, without any actual suspicion on the part of the officers of the bank, I cannot think it enough to defeat their right to charge the plaintiffs with those payments that they did not take a precaution not required by the law merchant, and on which they could not have insisted without the risk of the bills being treated by bonâ fide holders as dishonoured. In *Robarts* v. *Tucker* (1), payment through a banker was no protection to the defendant.

Some of these bills were in fact referred by the counter-clerks of the bank before payment to Mr. Disney, the principal in the private drawing office of the bank, not (as I understand the evidence) because of any suspicion, but because they had received general instructions that any cheques or bills of large amount should be so referred. Mr. Disney (the truth of whose evidence I see no reason to doubt) thought that if the bill was advised (as it was) the counter-clerk must pay it; and Mr. Ziffo, the plaintiffs' out-door manager, to whom (on his coming to the bank on other business in June, 1887), Mr. Disney mentioned the fact that such bills had been presented across the counter, and paid in bank notes, expressed the same opinion. This happened when not more than four of the bills, amounting altogether to 3000*l.*, had been presented and paid. When from time to time the plaintiffs' pass-book was sent to them, the bills then paid, and debited in it against the plaintiffs, were returned with it, and they remained from thenceforth in the plaintiffs' possession. It was apparent upon the face of them that all those bills had been paid across the counter; but no objection was taken by the plaintiffs on that or any other ground; and similar bills, to a continually increasing and ultimately very large amount, were afterwards from time to time advised, and came forward and were paid in like manner. I cannot hold that these circumstances are sufficient to deprive the bank of any right which they would otherwise have had to charge those payments to the plaintiffs' account.

The other point urged at your Lordships' bar (but not apparently before either of the Courts below) was, that according to

(1) 16 Q. B. 560.

the statement of Mr. Kurz, the plaintiffs' deputy-manager, in cross-examination, the course of post between London and Constantinople was four days; and nineteen out of the forty-three forged bills paid by the bank purported to be indorsed in Constantinople on the third day before the date of acceptance in London. No question was put on that subject to any other witness; and of the dates appearing on the bills, the plaintiffs also had notice when they were returned. One of these, of which the indorsement was on the third day before acceptance, was the fifth in the whole series. I think it would not be right in this state of the evidence, and upon a point which, though open upon the plaintiffs' pleading (in their reply), was for some reason not pressed on the Courts below, to treat the bank as having had notice that the indorsements were not regular.

The judgments in the Courts below, of the weight of which (as well as of the opinions agreeing with them, which I know some of your Lordships to entertain) I am fully sensible, seem to have been addressed to two questions only, that of the proper construction and effect of sect. 7, sub-sect. 3, of the Bills of Exchange Act, 1882, and that of negligence on the plaintiffs' part. As to the Bills of Exchange Act, I am not myself satisfied that Charles J. and the majority of the Judges in the Court of Appeal, were wrong in holding that the words of the statute, "where the payee is a fictitious or non-existing person," do not extend to the case of a real person falsely represented as payee upon a forged bill; though in principle the cases seem to me much the same. The difficulty to my mind arises out of the fact that the legislature has here described "*a person*" as "fictitious or non-existing"; instead of saying, "where the payee is fictitious or non-existing," and it has been increased rather than removed by reference to other parts of the statute, particularly sects. 5 (sub-sect. 2), 24, 41 (sub-sect. 1), 46 (sub-sect. 2), 50 (sub-sect. 2), and 54 (sub-sect. 2).

I cannot, however, agree with the opinion, that in the cases which do fall within the 3rd sub-section of sect. 7 knowledge on the part of the acceptor that the payee is a fictitious or non-existing person is still necessary. Such a qualification of the express words of the statute cannot properly, in my judgment,

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be implied from the earlier authorities which treated knowledge as necessary. Those authorities were no doubt within the view of the legislature, and all reference to the necessity of knowledge being here omitted, I think the omission must be taken to have been deliberate and intentional, and that there is no sound principle on which what is so omitted can be supplied by construction. I think it right to add that, in point of principle, it seems to me neither unjust nor unreasonable that the rights and liabilities of third parties should in such a case depend upon the facts, rather than upon an inquiry into the acceptor's state of mind. I am glad that the majority of your Lordships have seen your way with the Master of the Rolls to put a construction upon sect. 7, sub-sect. 3, of the Act of 1882 which makes its operation co-extensive with its principle.

As to the other point, my opinion does not rest upon mere negligence, but on what seems to me higher ground. Upon that ground I find myself compelled, notwithstanding my sincere respect for the opinions from which I differ, to give my voice in the appellants' favour. The amount in controversy is large; the question is one of much importance both to the parties and to bankers and their customers generally; and it is not, in my judgment, covered by any previous authority. The case of *Robarts* v. *Tucker* (1) is no doubt law; but I am not for extending it as it seems to me to be extended by the order under appeal.

LORD WATSON:—

My Lords, the bank and Vagliano Brothers appear to me to have been equally innocent—in this sense, that they entertained no suspicion that the forged documents which have given rise to this action were other than genuine bills of exchange; and also that nothing wittingly done, or omitted to be done by them, in the conduct of their respective businesses as bankers and financiers, can reasonably be regarded as the proximate occasion of Glyka's forgeries, or of the success which attended them. Which of these innocent parties must bear the loss resulting

(1) 16 Q. B. 560.

from Glyka's frauds is the only question to be determined in this appeal.

It seems to have been assumed by all the learned Judges in the Courts below, that in making payment of the bills in question on behalf of the acceptors the bank was under the same legal obligation to ascertain the identity of the payee which was held to attach to the defendants in the case of *Robarts* v. *Tucker* (1). That assumption, which is really the basis of the judgments appealed from, does not appear to me to be well founded.

The decision of the Queen's Bench in *Robarts* v. *Tucker* (1) has, ever since its date, been accepted in mercantile practice as determining the obligations incumbent upon bankers who agree to retire acceptances on account of their customers. It casts upon them the whole duty of ascertaining the identity of the person to whom they make payment with the payee whose name is upon the bill. They may pay in good faith to the wrong person, in circumstances by which the acceptor himself or men of ordinary prudence might have been misled; but they cannot take credit for such a payment in any question with the acceptor. It has been said by one of the learned Judges that the rule is a harsh one, and it is possible that in some instances it may operate harshly; but it appears to me to be settled beyond dispute, and I see no reason for suggesting any doubt that it puts a reasonable construction upon the contract constituted by the agreement of the banker to pay his customers' acceptances when they fall due. In the absence of any special stipulations it construes the arrangement so constituted as importing that, on the one hand, the customer is to furnish or repay to the banker the funds necessary to meet his obligations as acceptor; and that, on the other hand, the banker undertakes to apply the money provided by the customer, or advanced on his account, so as to extinguish the liability created by his acceptance. Accordingly, no payment made by the banker which leaves the liability of the acceptor undischarged can be debited to the latter.

The ratio of the judgment in *Robarts* v. *Tucker* (1) does not carry the liability of the banker beyond this point, that his

(1) 16 Q. B. 560.

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undertaking to retire bills genuine in their inception on behalf of acceptors who, by signing in that character became immediately indebted to the payees, implies an obligation on his part to discharge their debt, which he can only do by making payment to the proper creditor. It would obviously require a considerable extension of the principle in order to make it apply to documents purporting to be bills of exchange, in which the drawer's signature is a forgery, the payee a person who is not intended to be a holder, and the genuine signature of the acceptor has been procured by fraud. His signing such a document creates no legal obligation against the acceptor, although it is possible that he may be estopped from pleading his non-liability if and when the document has come into the hands of a bonâ fide holder for value. I venture to doubt whether the payee whose name was fraudulently inserted could ever occupy that position, because the occurrence of his own name in the original tenor of the bill would be sufficient notice to him that something was wrong and called for inquiry. At the time when Glyka's bills were presented for payment, they did not raise and never had raised any liability against Vagliano Brothers, although the latter informed the bank that they were liable and willing to pay; and when the bills had been paid by the bank and returned to them, there remained no debt due by Vagliano Brothers, which would have been the consequence of the bank's making an erroneous payment of a genuine bill.

The risk of error attending the payment of bills supposed to be genuine, but which are wholly counterfeit with the exception of the drawee's signature, is materially greater than the risk attending the payment of honest bills. In the latter case the danger of imposition can only arise from the document of debt having been stolen or fraudulently obtained from the true owner; whereas, in the former, the document, never having been in the possession of a real owner, will almost as a matter of certainty be used for the purpose of deceiving the acceptor, or the bank acting as his agent. In the ordinary course of business it is very difficult for a banker, who has no reason for suspecting fraud, to make an exhaustive inquiry in the case of each bill, as to the identity of the person by whom it is presented, without

exposing himself to claims of damage. But experience has shewn that the number of genuine bills which get into dishonest hands and are erroneously paid is comparatively insignificant, and does not materially affect profits derived from the business of retiring bills on account of the acceptor.

Again, it is well-nigh impossible that a regular system of appropriating genuine bills, in all of which the drawee, payee, and acceptor are the same, and of obtaining payment by means of forged indorsations, could be carried on for any length of time without discovery. If the series of documents forged by Glyka had been genuine drafts by Vucina in favour of Petridi & Co., it is hardly conceivable that even the ingenuity of Glyka would have enabled him to get possession of no less than forty-three of these bills, and to obtain payment of their contents at intervals extending over a period of eight months. In that case it is probable, if not certain, that detection would have followed at an early stage of his frauds; because the real payee would have discovered the loss of each bill as it fell due, and would have taken measures to stop payment.

It appears to me to be beyond dispute that the bank paid Glyka's spurious bills under the belief that they were genuine commercial drafts, and that their payment was attended with no greater risk of error than is incidental to the cashing of genuine bills. It would be ridiculous to suggest that the bank would have dealt as they did with these bills had it not been for the existence of that erroneous belief. The very fact that no payee complained of having lost a bill payable at their office, or of their having made payment to the wrong person, was well calculated to assure the bank that they had made and were making payment of all Vagliano Brothers' acceptances to the proper creditors.

It is, in my opinion, unnecessary to consider what would have been the precise extent of the implied obligation of the bank to Vagliano Brothers with reference to these forged bills if the latter had been unconnected with the belief upon which the bank acted, because that belief was induced and warranted by their representations. Their acceptances, if genuine, were in themselves distinct assurances, upon which the bank was

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entitled to rely, that each bill bearing their signature was a real draft upon them by their correspondent Vucina, and the notes sent by them to the bank from time to time directing payment of the bills were so many renewals of the same representation, strengthened by the further assurance that their acceptances were genuine.

Throughout these transactions the bank acted in good faith as the agent of Vagliano Brothers, and the errors into which they were betrayed were mainly if not wholly attributable to their having treated the bills as genuine, in reliance upon the representations of their principals, which were untrue. I think that in these circumstances Vagliano Brothers cannot be permitted to cast upon the bank liability for errors arising from their own representations. These representations were no doubt made in the honest belief that they were true; but that circumstance cannot, in my opinion, avail Vagliano Brothers in the present question with their agents.

These considerations are sufficient for the disposal of this appeal; but on considering the opinions which have already been expressed, and are yet to be delivered by your Lordships, I think it right to state my own opinion with regard to the construction of sect. 7, sub-sect. 3, of the Bills of Exchange Act, 1882. Upon that point I concur in the reasoning of my noble and learned friend Lord Herschell. I think that the language of the sub-section, taken in its ordinary significance, imports that a bill may be treated as payable to bearer in all cases where the person designated as payee on the face of it is either non-existing, or being in existence, has not and never was intended to have any right to its contents. The enactment has reference to real bills only, and has no direct application to these documents of Glyka's manufacture, which were not bills in their inception and never acquired the force of bills by virtue of estoppel. But the fact that the payees were fictitious within the meaning of the statute affords a good answer to Vagliano Brothers' contention that the bank was bound to deal with these documents on the same footing as if they had been real bills, and ought not to have paid except upon genuine indorsations by Petridi & Co.

For these reasons I concur in the judgment which has been moved by the Lord Chancellor.

LORD BRAMWELL:—

My Lords, the plaintiffs are merchants and agents or bankers for foreign traders. They kept a banking account with the defendants. That is to say they, the plaintiffs, paid to their credit with the defendants money, technically lent it, and doubtless delivered to them other assets, drew cheques on them and addressed accepted bills to them for payment. The plaintiffs claim of the defendants a large balance. The defendants admit the credit side of the account, but say they have paid bills accepted by the plaintiffs addressed to them, the defendants. It is immaterial, but this is not technically a set-off, for the defendants never could have maintained an action against the plaintiffs in respect of these payments. The plaintiffs never owed the bank anything. I say this is immaterial, but it is as well to be technical. Set-off or not, there is no doubt but that the defendants have, as they allege, paid bills accepted by the plaintiffs, and addressed payable at the defendants, equal to the amount claimed; but they have paid them to persons who could not have enforced payment of them from the plaintiffs. They were bills on which the plaintiffs were not liable to any holder unless he claimed under Petridi's indorsement, and which, if presented to them, they need not and possibly would not have paid. The drawing and indorsements on them were forgeries, or fictitious. It is for the defendants to establish that they have a right to charge the plaintiffs with the amount of these bills.

The first ground on which they claim this right is that the plaintiffs, by their conduct, wilful, careless, or unskilful, or all, enabled the fraud to be committed as to the whole or part (the part after the first one or two)—in effect, that the plaintiffs caused the defendants to pay these bills. I think it is necessary for the defendants to shew that the plaintiffs *caused* them to pay these bills as they did. It is not enough to shew that they gave occasion to their doing so—that different conduct would have prevented the fraud and the payment by the defendants.

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I think the result of the authorities, *Robarts* v. *Tucker* (1); *Young* v. *Grote* (2); *Bank of Ireland* v. *Trustees of Evans' Charities* (3); *Mayor, &c., of Merchants of England* v. *Bank of England* (4), is, that the conduct of the bank's customer to enable the bank to charge the customer must be conduct directly causing the payment.

Now, there is no doubt that there were many ways in which the plaintiffs might have detected the forgeries. The forged letters which advised the forged bills omitted to advise some which were genuine. Yet the latter were accepted by the plaintiffs. The letters of the plaintiffs to Vucina did not mention the forged bills. The plaintiffs signed a letter to Vucina in which the balance against him was in blank; that balance seems to have appeared in different amounts in the plaintiffs' books at different times. Then the forged bills were all indorsed on the part accepted, unlike the genuine bills. The bills after payment, had they been examined by the plaintiffs, would have shewn that they had not been paid through a banker. The indorsements would have been known to the plaintiffs' clerks and to the plaintiffs to bear impossible dates. It would have been seen that Pasqua appeared to leave the bills for acceptance and yet not to be the holder for payment. Maratis was a fictitious name and would not be known to the plaintiffs. Vucina's account became very large, the balance against him unusually large, but no notice was taken; and what was much pressed was that Glyka was enabled to steal and did steal the forged bills after their acceptance. It was not the duty of anyone exclusively, apparently, to give out bills accepted to those who called for them. I suppose as that call might be made at any time in the day, any clerk might go to the leather case, take out the bill, and give it out. It was kept in the room where Glyka sat. Whether this was negligence I cannot say. I really do not know; no witness said it was; it may be unusual; I say sincerely, I do not know—I cannot of my own knowledge or reasoning say it was; and there is no evidence. All these things put together make it wonderful that the fraud could be practised—most wonderful

(1) 16 Q. B. 560.
(2) 4 Bing. 254.
(3) 5 H. L. Cas. 389.
(4) 21 Q. B. D. 160.

that it could be practised to the extent it was without earlier discovery, but do not, in my opinion, give the defendants a right to charge the plaintiffs with the amounts paid for these bills as payment caused by them.

A great deal has been made of the advice-notes the plaintiffs sent to the defendants of bills becoming due, with a request to the defendants to pay them. In my judgment these advice-notes in no way help the defendants. They mean nothing more than the very acceptances themselves meant. The bills were accepted, payable at the defendants—but to whom? To those who could give a discharge for them and were entitled to enforce payment. That is all the advice-notes mean. Suppose a genuine bill really drawn by Vucina and really payable to Petridi, and suppose a forgery of Petridi's name, can it be suggested that the advice-note would enable the defendants to charge the plaintiffs with that bill if they paid it? Certainly not. With all respect, it is a mistake to suppose that by that, or by the very acceptance itself, any more or other representation is made by the plaintiffs to the defendants than that they, the plaintiffs, are estopped to anyone interested to deny that Vucina drew the bill. The plaintiffs are not estopped from saying that they are not liable to pay the bill unless it is indorsed by Petridi. I am afraid though, that that memorandum operates strongly on some opinions.

The other ground on which the defendants claim to charge the plaintiffs with the amount of these bills is that Petridi & Co., the payees, were fictitious persons within the meaning of the Bills of Exchange Act, sect. 7, sub-sect. 3, and that the defendants therefore might pay them to a de facto bearer. I differ on both points. It must be borne in mind that the Bills of Exchange Act is "An Act to *Codify* the Law relating to Bills of Exchange," not to alter or amend it, and by sect. 97 the rules of common law, including the law-merchant, "save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange."

Then, were Petridi & Co. fictitious or non-existing persons? There was a firm of that name, a firm as identifiable as N. M. Rothschild & Co., as Glyn, Mills, Currie & Co., as the Bank

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of England itself would be identifiable if their names appeared as payees of a bill of exchange; and to my mind that shews they were not fictitious or non-existing persons. It is asked, What if the payee were John Smith? Well, if there were nothing to identify a particular John Smith as payee when all "the surrounding circumstances" were looked at, it may be that he might be treated as a non-existent person. But what if it was shewn that the bill was delivered to a particular John Smith, in payment of a debt due to him from the drawer, could any holder of it treat it as payable to bearer, Smith's name being forged as indorser? Certainly not; but then it is said that that is not the case here; that the bill was not delivered to Petridi & Co., nor intended to be so; that, in the intention of the makers of the bill, Petridi was a sham, and so fictitious or non-existent; that Petridi & Co. are not fictitious nor non-existent, that they exist in the flesh, yet they are fictitious quâ payees, constructively fictitious; that if Vucina had drawn the bill, Petridi was real and existent, but inasmuch as Glyka did not mean Petridi to have the bill he was non-existent. This beats me. They are at the same time real and unreal, they are that which is said to be an impossibility, being and not being at the same time. The bill means one thing or another, according to the intent of the drawer, that the drawee has or has not a right to Petridi's indorsement, according as that intent is one thing or another. Because the argument would be the same if Vucina had really drawn the bills, but not intended Petridi to have them; a possibility, if Vucina will forgive me. That if Glyka had intended to commit his fraud through the innocent agency of Petridi, Petridi would be real and not fictitious. If the argument is good, it would shew that a bonâ fide holder of these bills not claiming through Petridi might have enforced payment from the plaintiffs. It is said that such a payment, i.e. to himself, is according to the intention of the drawer. So it is of the drawer de facto, but not of him who by the bill itself the drawee has a right to suppose is the drawer. The plaintiffs are estopped to deny that Vucina is the drawer; but they are not estopped to deny that Vucina meant that Petridi and his assigns should receive the amount of the bill, and that it should not be paid unless indorsed by Petridi.

This argument, as I have said, makes the effect of a bill depend, not on the meaning of the writing, but on the intent of the maker. A bill payable to the Bank of England is payable to a fictitious person if the drawer intends to forge their name and give it to another person. A payee is real or fictitious, at the option of the holder, within the Act. But it was shewn that a bill drawn like these might get into the hands of Petridi & Co., though not so intended, who might take it for value and be entitled to maintain an action against the plaintiffs. Would Petridi be fictitious then? It is asked, What difference does it make to the plaintiffs that there is a C. Petridi & Co. when, if the payee had been actually fictitious or unreal and the name was put on the back of the bill, it might be treated as payable to bearer? The answer is obvious. If the payee is a known person, the drawee can well believe that the drawing is genuine; he knows he cannot be made to pay without that person's indorsement. He knows that before presentment for acceptance the bill has been in ordinary course, or at all events will be, in the hands of a responsible person if a good name is used. His holding and indorsement are a guarantee that the bill is in right hands. Take this very case. Glyka could not have got Petridi's indorsement. I do not mean could not in point of law, but could not practically. Without that the plaintiffs were not bound to pay the bill. I have no doubt that Glyka chose Petridi's name to avoid suspicion. If it had been a strange name it might have attracted attention and caused some inquiry.

An argument is used which, with all submission, I think very feeble. It is said that the statute says "fictitious or non-existing," and that fictitious is needless on the plaintiff's construction; I do not agree. But what is the value of such an argument? Nothing, unless there is no other. A prudent draftsman does not accurately examine whether a word will be superfluous, he makes sure by using it.

A word on the case of *Cooper* v. *Meyer* (1). It is somewhat remarkable. The question was important; the judgment is singularly short, and nothing is said by Parke J. I think the

(1) 10 B. & C. 468.

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decision right. Lord Tenterden says, when the drawer is a real person his indorsement may be disputed; but if there is no such person and (Bayley J. also says) if the acceptor accepts without knowing there is such a person as the supposed drawer, the acceptor undertakes to pay to the signature of the person who actually drew the bills. Further, I should say that as the bills were accepted for the accommodation of Darby, with no knowledge of any such person as the drawer, the acceptor authorized the indorsement as he authorized the drawing by Darby. The Court did not say that no indorsement was necessary, or that any one but Darby could have indorsed. This case does not help the defendants.

I say, then, that Petridi & Co. were not fictitious or non-existent, and that the bill could not be treated as payable to bearer. But supposing it could, by whom could it be so treated? By the holder in due course: by the person who could maintain an action. Not by a man who stole it; not by a man who could maintain no action on it. The enactment is for the benefit of the holder—the honest holder who is embarrassed by the difficulties of there being no actual existing payee. Sect. 5, sub-sect. 2, says, that when drawer and drawee are the same person, or the drawee fictitious, or a person not having capacity to contract, the *holder* may treat the instrument as a bill or a promissory note; surely that means a holder for value. Suppose A. draws on a fictitious person, indorses it to B. for his (B.'s) accommodation, who negotiates it, and has to take it up. B. could not say, "The statute says I may treat this as a promissory note." The answer would be, "You are not a holder for value." Now in this case the money was always paid by the defendants to Glyka, or Glyka's agents. Glyka had no right to "*treat*" the bill in any way. It was in his possession by a theft; he clearly stole it after it was accepted.

The enactment I say is for the benefit of the holder, not of the acceptor; it gives rights against him. The plaintiffs could not, even if Petridi is considered as fictitious, treat these bills as payable to bearer. How could they? How can an acceptor treat a bill as payable to bearer? But if he cannot, if the section does not apply to him, neither does it apply to his agent for

payment, his banker, at whose house it is made payable. How can it be said that the plaintiffs have given a mandate to the defendants to pay these bills without Petridi's indorsement, to pay them to a person who had no right to receive the money, who could not have compelled the plaintiffs to pay them? These bills, as the acceptances were not "payable at the bank, and *not elsewhere*," might have been presented to the plaintiffs. Had they been, the plaintiffs could have refused payment, perhaps would. No one could have maintained an action against the plaintiffs on these bills. How can it be right that the defendants should have paid them? If a clerk of the plaintiffs had paid this bill, I agree he would not be liable to his employers unless his suspicions had been excited. But the duty of a clerk is different from that of a banker. The defendants have deprived the plaintiffs of this right to refuse payment by electing to pay. Let it not be supposed I find fault with them—I do not in the least; but so it is.

I am of opinion that this case is governed by *Robarts* v. *Tucker* (1). I own to a prejudice in favour of that case. I do not agree with the notion that a banker is entitled to make inquiries as to whether he should pay, as there suggested. He must honour or dishonour the bill on presentment. The case was decided on no such ground, but on this, that the customer's mandate is to pay only to such person or persons as can give a discharge of the instrument. I am afraid, however, that a dislike of that case has a good deal to do with opinions unfavourable to the plaintiffs. Lord Esher says that is a harsh case. I have heard able arguments on both sides: on the one side that the banker sees the person who presents the instrument; on the other, that the banker's customer knows the parties to whom he gives his acceptance or cheque. There are two remarks to be made. One is that the banker can bargain with his customer, if he likes (I do not mean by Act of Parliament, but he can make his stipulation with his customer), that he will not be liable in such cases as the present. The other is that bankers do not make such a bargain; yet they and banking, I am glad to say, flourish.

(1) 16 Q. B. 560.

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I have said nothing of the defendants paying this enormous amount over the counter to strangers. I have no doubt, as a matter of knowledge and of reasoning, that this was most unusual. There is, besides, cogent evidence that it was. The paying cashier inquired of his principal if the bill should be paid when first presented. The principal, according to his own account, thought it a thing to mention to the plaintiffs' clerk when the instances had been few. I have no doubt that (especially when the cases multiplied), instead of a gossiping intimation not enough to reach Ziffo's mind (as Charles J. finds), for the protection of themselves there ought to have been a formal communication to the plaintiffs. If Mr. Disney was satisfied with what he says Ziffo said to him, he is a very strange person. The thing is absurd. "I suppose you must pay if they have been advised." How could the advice that the bills would be presented for payment remove the suspiciousness of the presentment when it took place? True, the plaintiffs might have seen that the bills had been paid over the counter, but they trust to the defendants having paid properly. But I have not referred to this as a ground on which the defendants should fail. I have no doubt there was gross carelessness, but a carelessness to the bank's own hurt, a carelessness of precautions for their own good.

If, however, on some ground which I cannot see, the whole conduct of the parties is to be looked at, if it is to be said that the bank may charge Vagliano with payments they need not have made, then I think that must at least be limited to those payments which were reasonably, rightfully, and carefully made, and not to such as those in question.

I rely also on and agree with the judgments of the judges who have decided in favour of the plaintiffs; also on that of the Master of the Rolls, except that part which holds that C. Petridi & Co. were fictitious.

This is my opinion, and I am glad to think it is also that of my noble and learned friend Lord Field. I am sorry that it is not shared in by any other noble and learned Lord who heard the case. We are probably wrong, but—and I say it, I am sure I need not protest, with the most sincere respect for those who do not agree with me, for I know of no others more deserving

of respect—it is some comfort to me to think that the head-note of our opinion may be expressed very shortly and in the most abstract form—namely, "a banker cannot charge his customer with the amount of a bill paid to a person who had no right of action against the customer, the acceptor." But I think the head-note which will represent the decision of your Lordships should be in a strictly concrete form, stating the facts and saying that on them it was held that judgment should be for the appellants. I think the judgment for the respondents should be affirmed.

LORD HERSCHELL:—

My Lords, I propose to deal at the outset with the question of the construction of the Bills of Exchange Act, which gave rise to a difference of opinion in the Court below.

The facts material to this part of the case I take to be these. The bills in question purported to be drawn by Vucina, but were, in fact, entirely the production of Glyka, a clerk in the service of Vagliano Brothers, the respondents. He fraudulently procured the necessary forms to be printed and filled them up, inserting the name of Vucina as drawer and of C. Petridi & Co. as payees. A firm of C. Petridi & Co. carries on business at Constantinople, and had been the payee of some genuine bills previously drawn by Vucina upon Vagliano Brothers. I think there can be no doubt that this fact suggested to Glyka the insertion of the name of C. Petridi & Co.; but I do not believe that he made this choice with the idea that it would assist his fraud. I entertain no doubt, under the circumstances disclosed by the evidence, that Vagliano Brothers would equally have accepted the bills if any other name had been inserted, and that Glyka knew this. It was of course never intended by Glyka that Petridi & Co. should be the persons to whom the bill should be paid. The name was inserted merely to make the bills complete in form. The bills were accepted by Vagliano Brothers, payable at the Bank of England, who were requested by Vagliano Brothers to pay them at maturity. They were presented for payment with indorsements to all appearance regular, these having been written by Glyka, and were paid to the persons presenting them at maturity.

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The conclusion at which the majority of the Court of Appeal arrived with reference to the construction of the sub-section of the Bills of Exchange Act with which your Lordships have to deal is thus stated: "The word 'fictitious' must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced. If the drawer is the person against whom the bill is to be treated as a bill payable to bearer, the term 'fictitious' may be satisfied if it is fictitious as regards himself, or in other words fictitious to his knowledge. If the obligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, 'fictitious' must mean fictitious as regards the acceptor, and to his knowledge. Such an interpretation is based on good sense and sound commercial principle."

The conclusion thus expressed was founded upon an examination of the state of the law at the time the Bills of Exchange Act was passed. The prior authorities were subjected by the learned Judges who concurred in this conclusion to an elaborate review, with the result that it was established to their satisfaction that a bill made payable to a fictitious person or his order was, as against the acceptor, in effect a bill payable to bearer, only when the acceptor was aware of the circumstance that the payee was a fictitious person, and further, that his liability in that case depended upon an application of the law of estoppel. It appeared to those learned Judges that if the exception was to be further extended, it would rest upon no principle, and that they might well pause before holding that sect. 7, sub-sect. 3, of the statute was "intended not merely to codify the existing law, but to alter it and to introduce so remarkable and unintelligible a change."

My Lords, with sincere respect for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was

probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.

One further remark I have to make before I proceed to consider the language of the statute. The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment.

Turning now to the words of the sub-section, I confess they appear to me to be free from ambiguity. "Where the payee is

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a fictitious or non-existent person" means, surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee.

I can find no warrant in the statute itself for inserting any limitation or condition. I am putting aside for the present the question by whom a bill answering the description of the sub-section may be treated as payable to bearer, and I am accepting too for the moment the meaning attributed by the majority of the Court of Appeal to the word "fictitious," viz. a creation of the imagination, confining myself to the question in what cases a bill purporting on the face of it to be payable to order may be treated as payable to bearer. I find it impossible without doing violence to the language of the statute to give any other answer than this—In all cases in which the payee is a fictitious or non-existent person. The majority of the Court of Appeal read the section thus: Where the payee is a fictitious or non-existent person, the bill may, as against any party who had knowledge of the fact, be treated as a bill payable to bearer. It seems to me that this is to add to the words of the statute and to insert a limitation which is not to be found in it or indicated by it. It is said that when the acceptor is the person against whom the bill is to be treated as payable to bearer, "'fictitious' must mean fictitious as regards the acceptor, and to his knowledge." With all respect, I am unable to see why it must mean this. I confess I cannot altogether follow the meaning of the words fictitious "as regards" the acceptor. I have a difficulty in seeing how a payee, who is in fact a "fictitious" person in the sense in which that word is being used, can be otherwise than fictitious as regards all the world—how such a payee can be "fictitious" as regards one person and not another. The truth is the words, "as regards" the acceptor, are treated as equivalent to the words, "to the knowledge of" the acceptor. But I do not think these expressions are synonymous. It seems to me that to import into the statute after the words "fictitious person" the words "as regards" the acceptor or drawer, as the case may be, and then to interpret those words as meaning "to the knowledge of," only tends to obscure the fact that the condition that the payee must be fictitious to the knowledge of the person sought to be charged

as upon a bill payable to bearer is being introduced into the enactment.

For the reasons I have given I find myself compelled to the conclusion, notwithstanding my respect for those who have expressed a contrary view, that in order to establish the right to treat a bill as payable to bearer it is enough to prove that the payee is in fact a fictitious person, and that it is not necessary if it be sought to charge the acceptor to prove in addition that he was cognisant of the fictitious character of the payee.

My Lords, if the conclusion which I have indicated as being, in my opinion, the sound one, involved some absurdity or led to some manifestly unjust result, I might perhaps, even at the risk of straining the language used, strive to put some other interpretation upon it. But I cannot see that this is so, or that the interpretation I have adopted does any violence to good sense, or is otherwise than in accordance with sound commercial principle. I will assume that as the law stood at the time the Bills of Exchange Act was passed, a bill drawn to the order of a fictitious payee could have been treated as a bill payable to bearer only as against a party who knew that the payee was fictitious. This decision even was arrived at little more than a century ago, and was dissented from by distinguished judges, and it is obvious from the observations of Lord Ellenborough in *Bennett* v. *Farnell* (1) that by some eminent lawyers at least it was regarded rather as a departure from strict principle, which ought not to be further extended than as an embodiment of sound commercial principle.

But is it impossible to take any step beyond this without violating sound principle and working injustice? Let me draw attention for a moment to the relative position and rights of the drawer and acceptor of a bill of exchange. A drawee who accepts a bill does so either because he has in his hands moneys of the drawer, or expects to have them before the bill falls due, or because he is willing to give the credit of his name to the drawer, and to make him an advance by payment of his draft. It is immaterial to the acceptor to whom the drawer directs him to make payment: that is a matter for the choice of the drawer

(1) 1 Camp. 130, 180, c.

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alone. The acceptor is only concerned to see that he makes the payment as directed, so as to be able to charge the drawer. It is in truth only with the drawer that the acceptor deals; it is at his instance that he accepts; it is on his behalf that he pays; and it is to him that he looks either for the funds to pay with, or for reimbursement if he holds no funds of the drawer at the time of payment.

In the ordinary case, where the payee designated in the bill is a real person intended by the drawer to receive payment, either by himself or by some transferee, the acceptor can only charge the drawer, if he pays the person so designated, or some one deriving title through him. If payment be made to any other person, the drawer's liability on the bill is not discharged by payment; he will or may remain liable to the real payee, or those claiming under him, and the acceptor having paid otherwise than according to the directions of the drawer cannot justify the use of his funds in making the payment, or claim to be reimbursed by him. But now suppose the drawer inserts as payee the name of a fictitious person, requests the drawee to accept a bill so drawn, indorses the payee's name, and puts the bill into circulation. He certainly intended it to obtain currency and to be paid at maturity, and he as certainly did not intend it to be paid only to the payee named, or some one deriving title through him. Nor, as it seems to me, can it reasonably be said that he intended to direct the drawee to pay such person and such person only.

What then is the position of a lawful holder of a bill so drawn? I do not understand it to be doubted that even before the Bills of Exchange Act such a holder could enforce payment of the bill against the drawer, for he not merely knew that the payee designated was a fictitious person, but was himself the author of the fiction. As against the drawer then such a bill could be treated as payable to bearer. But if it cannot be so treated as against the acceptor, the holder, who, it may be, bought or discounted it on the faith of the acceptance, relying on the credit of the acceptor, and unwilling to trust to that of the drawer alone, is deprived of that upon which he relied, of the liability which he regarded as his security for payment. The holder in such a

case suffers wrong. Would any injustice result if the bill could, as against the acceptor also, be treated as payable to bearer? The drawer must be taken to have intended the bill to be paid by the acceptor at maturity—but to whom? Not to the fictitious payee, or some one claiming through him. Why not then to the bearer, who can hold the drawer liable upon the bill, and treat it as payable to him? And if it were the law that the acceptor was bound in such a case to pay the bearer, who would suffer? Not the drawer, for payment would have been made to a person who could compel him to make payment, and he could have no ground for complaint if the acceptor used his funds in thus discharging his liability on the bill, or in case he had not provided such funds if he were held liable to reimburse the acceptor. And how would the acceptor suffer in such a case? It was his object in accepting the bill to render himself liable to make payment to the person intended by the drawer to receive it, either out of moneys provided by him, or looking to him for reimbursement. His position under such circumstances would be precisely what it would have been if he had made payment to a real person designated as payee, or to those claiming under him. And it might, I think, fairly be said that he was making the payment in accordance with the intention of the drawer.

It may be that the right of the holder to treat such a bill, as against an acceptor ignorant of the fictitious character of the payee, as a bill payable to bearer, could not be established merely by an appeal to the law of estoppel, and that such estoppel would exist only against the drawer who knew that the payee was a fictitious person. I will assume that this was the law prior to the recent statute. But why should not the legislature have intervened with a positive enactment imposing this liability upon the acceptor—an enactment which, it seems to me, would wrong no one, and would prevent a holder for value from suffering wrong? Estoppel is not the only sound principle upon which a law can be based. The law of estoppel was not thought to afford sufficient protection to those dealing with the apparent owner of goods. The legislature deemed it necessary to intervene, and the Factors Acts were passed, each of which added something to the protection of persons so dealing. Why, then, should it be thought

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improbable that the legislature should have created in the holder of a bill drawn payable to a fictitious person a new right against the acceptor? If I am correct in thinking that this added right would obviate and not entail injustice, that it would make the law more reasonable and bring it more into conformity with the course of commercial transactions, I can see no reason for doubting that the legislature so intended, if this be the plain natural meaning of the words they have used, or for endeavouring so to construe the language as to find in it no more than a statement of the previous law.

I have dwelt at some length upon this point because it appeared to me important to shew that the words of the enactment might have their natural effect given to them without leading to results either unjust or commercially inconvenient. But I desired also to elucidate the principle upon which the enactment was, in my opinion, based; because this is not without its bearing upon the next question to be considered, and to which I will now pass. It is to my mind one of greater difficulty.

Even assuming, it is said, that where the payee is a "fictitious" person the bill may be treated as against the acceptor as a bill payable to bearer, the word "fictitious" is only applicable to a creature of the imagination, having no real existence, whilst in the present case "C. Petridi and Company" was the name of a firm having a real existence, so that the payee here cannot be termed a fictitious person. But are the words "where the payee is a fictitious person" incapable of legitimate application in any other case than that suggested? The first observation I have to make is, that, if so, there was no necessity for the introduction of the word "fictitious" in the enactment; the word "non-existent" would have sufficed. It was argued that whilst a fictitious person is one who has never existed, a non-existent person is one who has existed but whose existence has ceased. But even if this be admitted, the word "non-existent" would have sufficed, for it can hardly be doubted that it is employed as suitably in reference to that which has never existed as to that which, having existed, exists no longer.

Without however dwelling too much on this point, which may perhaps have a historical explanation, let me call attention to

the inconvenient complexity and strange and unmeaning distinctions to which, as it seems to me, the construction adopted by the Court of Appeal would give rise. If, for example, a drawer inserts after the words, "Pay to the order of," a name which he invents, himself indorses that name, and puts the bill into circulation, it is within the terms of the statute, and may be treated as a bill payable to bearer. But if he inserts the first name that occurs to him, though he never intends a bearer of that name to be the payee, or that title shall only be made through him, but himself indorses this bill and puts it into circulation just as he did the other, this bill, as I understand the Court below, stands in a different position. The case is not within the statute, and if the bill can be treated, even as against the drawer, as a bill payable to bearer, this does not depend upon the words of the enactment, but must result from the rules of the common law, which, in so far as they are not inconsistent with the express provisions of the Act, are by sect. 97, sub-sect 2, still to apply to bills of exchange.

It follows that, according to the view of the majority of the Court of Appeal, the legislature has dealt by express enactment with one case of estoppel—that is to say, where the payee is a "fictitious person" in the sense which they attribute to those words—but has left the analogous case, where, though the payee was not fictitious in that sense, the name was inserted as a mere pretence, and without any intention that payment should be made to the person designated, undealt with, and the rights and liabilities upon the bill to be ascertained by an appeal to the rules of the common law. Certainly a strange proceeding in a code of this description, and one for which it would be difficult to find a satisfactory explanation.

But this is not all. If I am right in thinking that in the case of a payee who is a fictitious person (whatever be the meaning of that expression) a bill may, as against the acceptor, be treated by a lawful holder as payable to bearer whether the acceptor knew of the fiction or not, why should this right and liability differ according as the name inserted as payee be a creature of the imagination or correspond to that of a real person, the drawer in neither case intending a person so designated to receive

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payment, and in each case himself indorsing the bill in the name of the nominal payee before putting it into circulation? I am at a loss for any reason why this distinction should exist. It is true that there is this difference between the two cases—that in the one an indorsement by the named payee is physically impossible, whilst in the other it is not. But I do not think this difference affords a sound basis for a distinction between the respective rights and liabilities of the drawer, acceptor, and holder. It seems to me that it would in each case be reasonable, and on the same grounds, that the acceptor should be liable to the holder of the bill, indemnifying himself out of the funds of the drawer or obtaining reimbursement from him.

It must be admitted, of course, that if the language of the statute is not reasonably capable of any other interpretation than that adopted by the majority of the Court of Appeal, if it will not allow of a construction which would cover the case we have been considering, then one must submit to the conclusion that the legislature has left the law in this respect in an unsatisfactory position and full of distinctions devoid of any sound principle. But are we compelled to this conclusion? Do the words, "where the payee is a fictitious person," apply only where the payee named never had a real existence? I take it to be clear that by the word "payee" must be understood the payee named on the face of the bill; for of course by the hypothesis there is no intention that payment should be made to any such person. Where, then, the payee named is so named by way of pretence only, without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word "fictitious" is exclusively used to qualify that which has no real existence. When we speak of a fictitious entry in a book of accounts, we do not mean that the entry has no real existence, but only that it purports to be that which it is not—that it is an entry made for the purpose of pretending that the transaction took place which is represented by it.

In his report of the case of *Stone* v. *Freeland* (1), the learned reporter speaks of there having been in that case "a fictitious

(1) 1 H. Bl. 316, n.

indorsement." The facts were that a bill had been drawn payable to Butler & Co., and indorsed in that name. There was a house, Butler & Co., with whom Cox, the drawer, had dealings; but the bill had never been in their hands, and appeared to have been indorsed by Cox. Now, in what sense was the word "fictitious" here used? Not, surely, to convey the idea that the indorsement had no real existence and was a mere creature of the imagination, but that it was put forward as being that which it was not.

These seem to me to be instances (and other illustrations might be given) of an analogous use of the word "fictitious" to that which, I think, may be attributed to it in the statute. Turning to the interpretation of the word "fictitious" in Dr. Johnson's Dictionary, I find amongst the meanings given are "counterfeit," "feigned." It seems to me, then, that where the name inserted as that of the payee is so inserted by way of pretence only, it may, without impropriety, be said that the payee is a feigned or pretended, or, in other words, a fictitious person. Stress was laid upon the fact that the words of the statute are, "where the payee is a fictitious person," and not "where the payee is fictitious." There is not, to my mind, any substantial difference in the meaning of the two phrases; and I cannot think that the legislature intended the rights and liabilities arising upon mercantile instruments to depend upon nice distinctions such as this.

For the reasons with which I have troubled your Lordships at some length, I have arrived at the conclusion that, whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may, in each case, be treated by a lawful holder as payable to bearer.

I have hitherto been considering the case of a bill drawn by the person whose name is attached to it as drawer, whilst the bills which have given rise to this litigation were not drawn by Vucina, who purported to be the drawer, his name being forged

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by Glyka. I think it was hardly contended on behalf of the respondents that this made any difference. The bills must, under the circumstances, as against the acceptor, be taken to have been drawn by Vucina, and if they have been made payable to a fictitious person within the meaning of the statute, I do not think it is open to question that they may, as against the acceptor, be treated as payable to bearer, in every case in which they could have been so treated if Vucina had drawn them. If, in the present case, Vucina had himself drawn the bills and inserted the name of C. Petridi & Co. as payees, as a mere pretence without intending any such persons to receive payment, it follows from what I have said that in my opinion they would have been bills whose payee was a fictitious person, and I do not think they can be regarded as any the less so, in view of the circumstances under which the name of C. Petridi & Co. was inserted.

Assuming, then, that the bills in question are within the sub-section of the Bills of Exchange Act which we are considering, and may therefore be treated as bills payable to bearer, the question remains, By whom may they be so treated? By a bonâ fide holder for value, certainly; and in considering the construction of the section, I have thus far limited my attention to the case of such a holder. It is the case which ordinarily arises in the course of commercial transactions with negotiable instruments, and it is the one, therefore, which must be taken to have been primarily had in view in framing a law to determine the rights and liabilities in respect of such instruments. But I can see nothing in the words of the enactment to confine their application to this case.

It appears to me that the natural answer to the question which I have proposed is this: a bill, within the sub-section, may be treated as payable to bearer by any person whose rights or liabilities depend upon whether it be a bill payable to order or to bearer. I, of course, exclude the case of one who is a party to, or who has notice of, a fraud. At all events, I can see no reason why a banker who has been requested to pay the bill by his customer, the acceptor, may not so treat it. Where the bill is, in truth, payable to order—that is to say, where the drawer intends that payment should be made only to the person named

as the payee, or to someone deriving title through him—then the direction to the banker must, since the decision in *Robarts* v. *Tucker* (1), be taken to be a direction to pay to such person only. But where the payee is a fictitious person within the meaning of the sub-section, I think the direction to the banker must be taken to be to pay the bearer. It is by reason of his filling that character that the holder is entitled to demand payment of the acceptor. And when a banker has been instructed by the acceptor to pay such a bill on his behalf, it is to the person filling that character that he must be taken to have intended the payment to be made. If the holder were a bonâ fide holder for value who, if payment had been refused, could hold the acceptor liable, I do not think this could be doubted; and where the bill is one which might be treated as payable to bearer by a bonâ fide holder, so that the direction to the banker to pay the bill is a direction to pay the bearer, I do not think that the banker is any the less entitled to charge the payment of the bill against his customer, because the bearer to whom payment is made holds it under such circumstances that the acceptor could successfully resist a claim for payment by him. It cannot be doubted that this would be so where a bill was in terms payable to bearer, and I do not think there is any sound distinction in the relative position of banker and customer between this case and that of a bill which may be treated as payable to bearer.

I cannot think that the view I have indicated works any injustice. It is too late now to question the decision in *Robarts* v. *Tucker* (1). It has been long acted upon and regarded as law, though the decision certainly seems to have rested upon the assumption that it was possible for a banker to do that which would be, commercially speaking, absolutely impracticable, viz., to investigate the validity of all the indorsements before he complied with the direction of his customers and paid the bill. In the case there dealt with, however, the complaint of the customer was that the banker had paid the wrong person, leaving him liable to pay the right one. Here the position of the customer is, that in spite of his direction to the banker to pay the bill he ought not to have made payment to anyone. The

(1) 16 Q. B. 560.

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conclusion at which I have arrived is exclusively based upon the construction of the terms of the statute, uninfluenced by these considerations; but I am glad to think that it leads to a result which cannot, in my opinion, be regarded as either unjust or commercially inconvenient.

The conclusion which I have indicated is sufficient to determine the case in favour of the appellants. I have not found it necessary, therefore, to form a decisive opinion upon the other questions raised; but I do not desire to be understood as dissenting from the view entertained by some of your Lordships, that, apart from the provisions of the statute, the facts of the present case afford sufficient grounds for arriving at the same decision.

LORD MACNAGHTEN :—

My Lords, it can hardly be denied that the business of Vagliano Brothers was conducted in rather a loose fashion. There was no check on the clerks; there was no effective supervision over the work of the office. But, apart from the error committed in taking the forgeries of a clerk for the signature of a correspondent whose bills the firm was in the habit of accepting, there was nothing, I think, in the conduct of the business, or in what Vagliano himself did or omitted to do, which can afford a plausible answer to the plaintiffs' claim. On the other hand, the fact that the sums in question were paid over the counter ought not, I think, to prevent the bank from setting up any defence which would have been available if the money had been paid through another bank.

Putting aside these matters, to which a good deal of evidence was directed, the case lies in a narrow compass. But it is one of much difficulty. There is no authority which governs it. Very little assistance is to be derived from reported decisions. And it is by no means easy to apply to Glyka's fabrications rules of law intended for genuine bills of exchange and principles applicable to honest commercial transactions.

There are, I think, two questions to be considered: (1.) Is the bank entitled to be indemnified against the moneys paid in respect of these forged bills, although the bills may not have been paid according to their tenor? (2.) Can the bank treat

the bills as payable to bearer, and so justify the payment as being in accordance with their customer's mandate?

As regards the first question the following points are, I think, established.

(1.) The relation of banker and customer does not of itself, and apart from other circumstances, impose upon a banker the duty of paying his customer's acceptances.

If authority is wanted for this proposition it will be found in *Robarts* v. *Tucker* (1), where it was said by the Court that "if bankers wish to avoid the responsibility of deciding on the genuineness of indorsements, they may require their customers to domicile their bills at their own offices, and to honour them by giving a cheque upon the banker." That implies that bankers may refuse to pay their customer's acceptances, and that such refusal is not inconsistent with the relation of banker and customer, or a breach of the banker's duty to his customer.

(2.) If a banker undertakes the duty of paying his customer's acceptances, the arrangement is the result of some special agreement, expressed or implied. And such an agreement in the absence of express stipulation to the contrary must have reference solely to genuine bills of exchange. It cannot be supposed to contemplate any dealings with fictitious instruments.

(3.) Bankers who undertake the duty of paying their customer's acceptances cannot do otherwise than pay off-hand, and, as a matter of course, bills presented for payment which are duly accepted and regular and complete upon the face of them.

It would be out of the question for a banker to adopt the suggestion made by one of the learned Judges in *Robarts* v. *Tucker* (1), and defer payment until satisfied by inquiry and investigation that all the indorsements on the bill are genuine. That is hardly a practical suggestion. A banker so very careful to avoid risk would soon have no risk to avoid.

(4.) In paying their customer's acceptances in the usual way bankers incur a risk perfectly understood, and in practice disregarded. Bankers have no recourse against their customers if they pay on a genuine bill to a person appearing to be the holder, but claiming through or under a forged indorsement.

(1) 16 Q. B. 560.

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The bill is not discharged; the acceptor remains liable; the banker has simply thrown his money away. That was the effect of the decision in *Robarts* v. *Tucker* (1). I do not think that that was a harsh decision. Nor do I see how the Court could have come to any other conclusion, unless it had taken quite a different view of the customer's mandate and the banker's obligation. At any rate the ground of the decision is now part of the statute law. The Bills of Exchange Act, 1882, enacts (sect. 24) that, subject to certain provisions, which for the present purpose are immaterial, a forged or unauthorized signature on a bill is wholly inoperative, and that no right to retain the bill or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, except in the case of an estoppel. Nothing but legislation could have relieved bankers from the liability attaching to them in accordance with the law as declared in *Robarts* v. *Tucker* (1). The fact that no such legislation has ever been promoted or, I believe, advocated on behalf of bankers in the case of bills of exchange, though the law has been relaxed as regards cheques, seems to shew that in the case of genuine bills the liability is of little or no practical importance.

(5.) The drawee of a bill is bound to know the drawer's signature. It is his fault if he writes his acceptance on a forged instrument. And it is his act of acceptance which sends the bill forward for payment to the banker.

(6.) In the case of a counterfeit bill, the payee's signature must be forged unless the person named as payee is an accomplice in the fraud. And, therefore, if there is no accomplice, assuming *Robarts* v. *Tucker* (1) to apply, an acceptance making the bill payable at a bank necessarily entails upon the banker the loss of the sum for which the bill purports to be drawn. The banker has no chance of escape. Relying on his customer's acceptance, he takes it for granted that the bill is genuine. Ignorant of any danger, beyond the possible risk of a theft having been committed and remaining still undiscovered, he pays the apparent holder as a matter of course.

(1) 16 Q. B. 560.

It seems to me that if these premises are well-founded, the bank is entitled to be indemnified by Vagliano Brothers in respect of the money paid on the forged bills which Vagliano accepted and directed the bank to pay.

If A. employs B. on his behalf to deal with articles of a certain description in a particular way, and then A., through inadvertence or otherwise, introduces among the articles with which B. is to deal a dangerous counterfeit not distinguishable in appearance from its companions, I cannot doubt that A. is bound to indemnify B. against any loss resulting from his dealing with the counterfeit as if it were a genuine article within the scope of his employment. And it cannot, I think, make any difference that B. is bound by the terms of his employment to bear every risk incident to his dealing with the genuine article.

There is, I think, a wide distinction between this case and *Robarts* v. *Tucker* (1), though in both it was the duty of the bankers to pay bills of exchange accepted by their customers to the person who according to the law-merchant was capable of giving a good discharge, and in both the bankers were cheated out of their money. In the one case the customer's acceptance introduced to the bank a genuine mercantile instrument, though it had been tampered with by a thief without the fault or the knowledge of the customer. In the other, the acceptance introduced a fraudulent counterfeit which the customer ought to have detected. In *Robarts* v. *Tucker* (1) there was presented for payment a genuine bill bearing a forged indorsement. The bankers paid the wrong man, leaving the bill unpaid and the liability of the customer undischarged. They claimed credit all the same. But they did not pretend that they had done what they were told to do; nor could they allege that their employer had any hand in misleading them. Of course their claim was rejected. In the present case the bankers have not failed in the performance of any duty towards their customer. They undertook no duty, they accepted no mandate, in regard to pieces of paper which are not bills of exchange, and with which the law-merchant has no concern. They, too, have been cheated out of their money.

(1) 16 Q. B. 560.

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Whether they can say that they have done what they were told to do remains to be considered. At least they can say that their employers were active, though no doubt unconscious instruments, in carrying out the deception which led to their loss.

I now come to the second question, which depends on the effect of sect. 7, sub-sect. 3, of the Act of 1882. The enactment, of course, was not directed to such a case as this. The provisions of the statute were meant for genuine bills of exchange. But if the argument on behalf of the bank is right, it happens to furnish a short answer to a claim which fails on broader and, I think, more satisfactory grounds.

On behalf of the bank, it was pointed out that these pretended bills, being duly accepted and regular and complete on the face of them, were presented for payment apparently in due course; and it was said that although no doubt at the time they were taken to be payable to order, and to be duly indorsed by the payee, yet when it turns out that the payee was a fictitious person, they may be treated as payable to bearer, and so the payment is justified though all the indorsements are inoperative.

On behalf of Vagliano Brothers, it was contended that a bill payable to a fictitious person is not payable to bearer unless the acceptor is proved to have been aware of the fiction; and further, it was contended that nothing but a creature of the imagination can properly be described as a fictitious person. I do not think that either of these contentions on behalf of the respondents can be maintained.

Before the Act of 1882, the law seems to have been, as laid down by Lord Ellenborough in *Bennett* v. *Farnell* (1), that "a bill of exchange made payable to a fictitious person or his order, is neither in effect payable to the order of the drawer nor to bearer, unless it can be shewn that the circumstance of the payee being a fictitious person was known to the acceptor." The Act of 1882, sect. 7, sub-sect. 3, enacts that, "Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." As a statement of law before the Act that would have been incomplete and inaccurate. The omission of the qualification required to make it complete and accurate as

(1) 1 Camp. 130, 180, c.

the law then stood seems to shew that the object of the enactment was to do away with that qualification altogether. The section appears to me to have effected a change in the law in the direction of the more complete negotiability of bills of exchange—a change in accordance, I think, with the tendency of modern views and one in favour of holders in due course, and not, so far as I can see, likely to lead to any hardship or injustice.

Then it was said that the proper meaning of "fictitious" is "imaginary." I do not think so. I think the proper meaning of the word is "feigned" or "counterfeit." It seems to me that the "C. Petridi & Co." named as payees on these pretended bills were, strictly speaking, fictitious persons. When the bills came before Vagliano for acceptance they were fictitious from beginning to end. The drawer was fictitious; the payee was fictitious; the person indicated as agent for presentation was fictitious. One and all they were feigned or counterfeit persons put forward as real persons, each in a several and distinct capacity; whereas, in truth, they were mere make-believes for the persons whose names appeared on the instrument. They were not, I think, the less fictitious because there were in existence real persons for whom these names were intended to pass muster.

In the result, therefore, I think that on both grounds the bank is entitled to succeed. Nor is that conclusion altogether to be regretted. An opposite conclusion would, I think, go a long way to encourage mischievous negligence on the part of persons called upon to accept bills of exchange. To an acceptor it would be a matter of indifference whether the drawer's signature were genuine or not. If it were genuine, the transaction would be completed in regular course. If it were not genuine, the loss would fall, not on the acceptor whose negligence had led to it, but on the banker, who could have no means of detecting the forgery and must have been thrown off his guard by the carelessness of his employer.

LORD MORRIS :—

My Lords, I entirely agree in the conclusion arrived at by my noble and learned friend Lord Herschell, viz., that whenever the name inserted as that of the payee is inserted without any

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intention that payment shall only be made in conformity therewith, the payee becomes a fictitious person within the meaning of the Bills of Exchange Act, 1882, sect. 7, sub-sect. 3, and that the bill may be treated by a legal holder as payable to bearer; and having had the advantage of reading the noble and learned Lord's judgment in print, I concur in the reasoning by which that conclusion is arrived at.

My Lords, that conclusion appears to me not only to embrace the bills which are the subject of this litigation, but I am of opinion they are à fortiori, and necessarily, within the statute as bills payable to bearer. The bills were regular in form, with Vucina of Odessa as drawer, Petridi of Constantinople named as payee, and Vagliano as drawee. Vagliano accepts the bills; that acceptance is the only real action of the three parties named in the bills. Vucina drew none of the bills, and knew nothing whatever about them; Petridi had no knowledge of or any connection of any kind with them; Vucina, though a known existing person, had no reality in regard to them; the paper writings only became bills as against Vagliano, who by his acceptance is estopped—in the language used in the statute, is precluded—from denying they were bills as against the bank who paid them on the faith of his acceptance, and also upon his express requisition to do so. If Vucina was an unreal person, Petridi must be also an unreal person, and therefore a fictitious person in regard to the bills. The drawer can alone designate the payee; but there was, in fact, no drawer. Vucina, the alleged drawer, could not and did not name any payee; Glyka, the forger, who wrote the documents in the form of bills of exchange, was not a drawer: he forges the name of Vucina as drawer; that cannot constitute Glyka himself a drawer. Vucina cannot become the alter ego of Glyka because Glyka forged his name, nor can Glyka be the alter ego of Vucina, who never knew of or heard of Glyka's existence; the only person who could call into existence a payee had no legal existence. There never was, in fact, a real bill of exchange. Though the acceptor, Vagliano, is bound to know the drawer and guarantee his existence and handwriting, and is precluded from denying against the holder that it is a bill of exchange, only to the extent of the

estoppel is the document a bill of exchange. In the case of a real drawer, that the payee is a fictitious person (unless it is obvious on the face of the bill) must be proved by the holder; but in the case of an unreal drawer, as a fact, the unreality, and therefore fictitiousness, of the person named as payee follows necessarily.

I am of opinion that the judgment of the Court of Appeal should be reversed.

LORD FIELD :—

My Lords, the question in this case between the appellants, the Bank of England, and their customer, a foreign banker and merchant, shortly stated, is whether the appellants are justified in debiting the respondent's account with various payments made by them, amounting in the whole to the sum of £71,500. The sums so paid were the amounts of a series of documents purporting to be bills of exchange and to have been drawn upon the respondent by one of his correspondents at Odessa named Vucina, and to be payable to the order of "C. Petridi & Co."

The acceptances by the respondent of these supposed drafts were genuine, although obtained from him by a fraud to which he was no party; but the drawings purporting to be by Vucina were forgeries by one of the respondents' clerks named Glyka, who having, after acceptance, also forged indorsements of the name of the firm of the alleged payees, obtained payment of the amounts from the appellants, at whose bank the respondent had made the acceptances payable.

Besides making the acceptances so payable, the respondent had, previous to their falling due, advised the appellants of his having so accepted by letters in the following terms :—

"From Vagliano Brothers to the Cashiers of the Bank of England.

"19, Old Broad Street, London, E.C.

"17 February, 1887.

"The undernoted bills have been accepted by us and made payable with you, which please pay at maturity and debit our account.

"Yours truly,

"Vagliano Brothers.

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"No. 97,326, drawn by G. Vucina, Odessa, 4 February, due 18th instant, £650. No. 97,332, drawn by D. P. Pulaco, Piraius, 29 January, due 18th instant, £200."

The second of these two bills was an ordinary genuine bill in no way connected with the present question; the first was also the first forgery by Glyka, and as it fell due in the course of the then current month, and had been accepted subsequent to the general monthly advice, it was the subject of a special advice.

The second forged draft (for £700) fell due on the 7th of March, and was included in the usual monthly advice, which was in the following form:—

"Vagliano Brothers,
"List for March enclosed.
"19, Old Broad Street, London, E.C.
"28th February, 1887.
"The Cashiers of the Bank of England.

"Gentlemen,

"Herewith we beg to hand you over list of acceptances falling due next month and made payable with you, which be good enough to pay at maturity and debit our account.

"Yours truly,
"Vagliano Brothers."

Enclosed with the letter was a list of bills describing them by the date when drawn, the number, the drawer's name and residence, the date when due, and the amount. Similar letters were subsequently regularly sent by the respondents to the appellants, in which the acceptances making up the residue of the £71,500 were advised.

The transactions between Vucina and the respondent are very large, representing at times over a million sterling in the course of a year; and, amongst other drafts by Vucina, the respondent had in the years 1886 and 1887, before the commencement of, and in one instance contemporaneously with, the transactions now in question, accepted genuine drafts of Vucina, sixteen or seventeen in number, payable to the order of a firm of C. Petridi & Co., carrying on business in Constantinople, and with whom Vucina had numerous transactions. Indeed, if Glyka is to be believed, there had been a direct communication between the

respondent and C. Petridi & Co. in reference probably to some of these genuine drafts, all of which represented genuine transactions between Vucina and C. Petridi & Co., and the indorsements upon which the appellants had paid them were all genuine and in order. There cannot, I think, indeed be much doubt but that Glyka, having obtained possession of some of the genuine business letters of Vucina and of genuine acceptances and indorsements, made use of them to fabricate his forgeries, probably also thinking that the names being familiar to the respondents' clerks no inquiry would be made.

There were of course no transactions of any kind in reference to which those bills could be supposed by anybody to have come into existence or be used; but that Glyka intended to make use of the actual names of existing persons, and existing to the knowledge of the respondent or his clerks, to facilitate his fraud, I entertain no doubt. It is equally clear that Glyka had no intention whatever that the acceptances should ever come to the knowledge either of the alleged drawers or payees. He doubtlessly expected to be able, as the result of his Stock Exchange speculations, to retire them before maturity, and conceal their existence from the respondent.

Under these circumstances, the appellants, firstly, contended that the payees named in the draft were "fictitious persons" within the meaning of the 7th section, sub-sect. 3, of the Bills of Exchange Act, 1882, and that the bills were, therefore, according to their tenor and effect in law bills payable to bearer; so that whatever might have been the original limits of the authority under which the appellants had acted in undertaking the making of the payments complained of, it was competent to them, now that the actual facts had been discovered, to shew and rely upon them as justifying their right to debit the respondent with the amount.

I will deal with that contention first. That the terms of the original mandate, as between the appellants and respondent, were limited to payment to the actual indorsees of the payees named in the instruments is I think clear, and was not, if I followed the argument of the appellants correctly, seriously disputed. At the times of acceptance and payment neither party entertained any

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suspicion that C. Petridi & Co. were other than what they appeared to be, genuine payees, and Vucina a genuine drawer. The respondent, therefore, had the right to assume that by making the payment to the order of the payees he would acquire a discharge to that amount in his accounts with the assumed drawer, Vucina.

On the other hand, it appears from the evidence that the bank on presentation of the acceptances did no more than refer to the advices and indorsements in order to satisfy themselves that the bills were in order. In other words, by accepting the duty of paying the acceptances at maturity, they intentionally undertook the risk which the law-merchant has been held, under those circumstances, to impose upon bankers in the case of a genuine acceptance (*Robarts* v. *Tucker* (1)); a liability the existence of which I understood the appellants did not deny, but they endeavoured to distinguish that case from the present by a circumstance which did not exist in that case, viz., that the respondent in this case had by the letters of advice untruly although innocently, represented the drawing as genuine, whereas it being a forgery, the appellants in paying the amount would acquire no valid discharge against any valid drawer.

Assuming, however, that the letters of advice amount to such a representation, it does not appear to me that the appellants in making the payments complained of relied in any way upon it, nor that the representation goes any further than the acceptance itself, which in the case of *Robarts* v. *Tucker* (1) was held insufficient to vary the duty of the banker.

The sole question in this case appears to me to be, whether in making the payments to Glyka the bankers have complied with the direction of their customer. That direction is found in the letters of advice and the acceptances, and I do not see that the terms of the latter differ from the former. The question, therefore, upon the first point seems to me to be reduced to this: whether, as alleged by the appellants, the payees were "non-existing or fictitious persons" within the 3rd sub-section, and if so, whether as against an acceptor no party to and ignorant of the fiction the bills might be treated as payable to bearer so as to justify the payments to Glyka.

(1) 16 Q. B. 560.

Upon this point the appellants argued that, as in fact there was no person in existence capable of giving the discharge contemplated by the acceptor, or of making a valid title by indorsement, they were under no obligation to make any inquiries as to the named payee's indorsement, or require it, but were justified, as against the respondent, in payment to bearer; that being in law the tenor and effect of the bill.

In support of this proposition they cited various cases decided in the Courts of Common Law for the purpose of shewing that where the names in one case, even of known and existing persons, had been inserted as payees fictitiously, and without any intent that they should be actual payees, the Courts had treated the bills as payable to bearer. Those cases have been fully discussed and dealt with in the Courts below, and it will, I think, appear that in all of them the persons against whom the bills were so treated had been parties to the putting forth of the bills, either with knowledge of the fictitious insertion, or with authority to make the instrument (as when accepted in blank) a negotiable instrument for the payment of money to somebody, which a holder in due course must of necessity have the right to enforce against somebody, so that the parties to their emission could not be heard to say that the bills were not payable at all for want of an indorsement by a payee who was never intended to have the power to, and could not make, any valid indorsement.

The case nearest to the present in its facts is that of *Cooper* v. *Meyer* (1). There the persons named as payees were known and existing persons, although their names were fictitiously inserted by the drawer as payees without any intention that they should have anything to do with the bills. But the point decided in that case simply was, that the acceptor, for whom the holder had discounted the bill, having accepted for the accommodation of the drawer who had been guilty of this fiction, evidence that the handwriting of the indorsement was the same as that of the drawing was sufficient as against the acceptor, who was precluded from denying the drawing, and who, it was said, had given credit to the drawer's handwriting.

Upon the authority of these cases, and what was said to be the

(1) 10 B. & C. 468.

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true construction of the statute, it was contended that the fraudulent intention of Glyka in inserting C. Petridi & Co. as payees, although unknown to the acceptor, had, as against him, converted an acceptance which was in terms payable to a named payee "or order" into a liability to pay any bearer. But I fail to see how upon principle the intention of a drawer can alter the terms of a bill in which there is a named and ascertainable payee. All it can do is, where more than one person fulfils the description of the payee in the bill, to say which was the person intended: *Mead* v. *Young* (1); and I therefore have come to the conclusion, which has been arrived at by the noble and learned Lord (Lord Bramwell), that the payees in the present case were not "fictitious or non-existent persons," within the meaning of the statute, so as to entitle the appellants to treat the respondents' acceptances as payable to Glyka or any other bearer.

It was not denied that the firm of C. Petridi & Co., who were so named as payees, were existing persons carrying on business at Constantinople, that they were known to be such to Vucina and others, and that the respondent had been in commercial relations with them by paying bills to their genuine indorsements. They are, however, said to be "fictitious" persons, because Glyka intended so to deal with the bills that the fact that their names appeared upon them should remain concealed. Now what he intended was to obtain the amount of the bills by fraudulently inserting a genuine name as the payee, relying upon his being able, in his position in the respondents' counting-house, to prevent the discovery of the forgery. But I cannot see how that can render actual existing persons fictitious within the meaning of the statute. If he had made Rothschild of Vienna, or Hirsch of Constantinople, payees, that would have been as fraudulent, but would not have made them fictitious persons.

In this view it is unnecessary to consider whether, if the payees had been fictitious persons within the meaning of the statute, the bills might be treated as against the respondent, who was ignorant of the fiction, as payable to bearer.

But the appellants argued, secondly, that even if the payments in question could not be justified in themselves, the conduct of

(1) 4 T. R. 28.

the respondent precluded him from complaining of them. They urged that his representation in the letter of advice that the bills were genuine commercial instruments, his instructions to honour them at maturity, coupled with such a lax system of business as enabled a man in the position of Glyka to concoct and carry into effect his extensive frauds; the omission to examine the forged indorsements on the bills when periodically returned by the appellants; the non-observance of the omissions in the forged letters, which ought to have been noticed and so excited inquiry, and the amount of the forged acceptances—£6000 in June, £19,000 in July, and over £15,000 and £16,000 in August and September—which ought also to have excited attention, amounted to conduct without which the loss would not have happened, and which so far conduced to the loss as to render the alleged rule applicable, that where a loss has to fall upon one of two innocent parties, it ought to be held to fall upon the party conducing to it.

The appellants' case in this respect is, I think, a strong one, and deserving of great consideration, and, as I look upon their position as one of considerable hardship (for in any view of the case the forgeries by which they were deceived had been concocted and carried out by the respondents' servant, and, as I think, without such care and supervision on the respondents' part as I should like to have seen), I should have been well satisfied if, consistently with what I conceive to be the law, I could have held in their favour.

No doubt in one case (*Lickbarrow* v. *Mason* (1)), Ashhurst J. stated, as a broad general principle, that whenever one of two innocent parties must suffer by the act of a third person, "he who has enabled such person to occasion the loss must sustain it."

But more recent decisions, and one of this House of great importance, have either shewn that this proposition is not to be understood in all its generality or cannot be supported; and this was very clearly pointed out in two cases which were not, I think, cited in argument (*Arnold* v. *Cheque Bank* and *Arnold* v. *City Bank* (2)) by the Judges constituting the Common Pleas Division, who in a very careful judgment reviewed all the

(1) 2 T. R. 70.

(2) 1 C. P. D. 568.

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authorities. It was an action by the drawer to recover the proceeds of a bill which had been received by the defendants upon a forged indorsement, and negligence affording facilities for the fraud was set up, and evidence in support of it tendered at the trial, but rejected by the Lord Chief Justice. There were several acts of alleged negligence relied upon, some of them of a similar character to some of those relied upon in the present case.

In delivering the considered judgment of the Court, consisting of the Lord Chief Justice, and the now Lord Justice Lindley, and Mr. Justice Archibald, the Lord Chief Justice said on the second and third points: "It was contended by the defendants that there was evidence of negligence in the custody and transmission of the draft by the plaintiffs, which afforded facilities for the forgery and fraud, by which the defendants were induced to receive it, and that the evidence which was rejected would have shewn an almost invariable custom for merchants in America remitting bills to correspondents in England to send another independent letter of advice either by the same or a subsequent mail, and that there were opportunities of sending such a letter by other vessels leaving on the same day as the *Celtic*, or on subsequent days, which would have arrived in time to have enabled Messrs. Williams & Co., the indorsees, whose indorsement had been forged, in the event of their not having received the draft in due course, to have communicated with Smith, Payne, & Smith, either by letter or telegram, to have stopped payment. We are of opinion, however, that there was no evidence of negligence which could operate by way of estoppel to the plaintiffs. Reliance was placed by the defendants on the case of *Young* v. *Grote* (1). That case, no doubt, must be considered as well decided; but various opinions have been expressed as to the real ground of the decision. But we have only to look at the case itself to see that it really proceeded on the authority of the extract from Pothier cited in the judgment of Best C.J. which makes the inability to recover depend upon the fault of the drawer of the cheque in the mode of drawing it, and is entirely consistent with the rule laid down and explained on fuller consideration in subsequent cases, viz., negligence in

(1) 4 Bing. 254.

order to estop must be negligence in the transaction itself; see per Blackburn J. in *Swan* v. *North British Australasian Company* (1). Indeed, in a later case: *Bank of Ireland* v. *Evans's Charities* (2), this is stated by Parke B. himself to be the true ground of decision. The rule, which is expressed by Ashhurst J. in *Lickbarrow* v. *Mason* (3), 'We may lay it down as a broad general principle that whenever one of two innocent parties suffers by the act of a third person, he who has enabled such person to occasion the loss must sustain it,' was, though not expressly referred to, observed and acted on in *Young* v. *Grote* (4); and it has received illustration and explanation in subsequent cases on the subject, which shew that the words 'enabling a person to occasion the loss,' must be understood to mean by some act, conduct, or default in the very transaction in question: see *Freeman* v. *Cooke* (5). The correct rule seems to us to be that which is thus stated by Blackburn J. in his judgment in *Swan* v. *North British Australasian Company* (1), where, referring to the judgment of Wilde B. below, he says: 'that he omits to qualify the rule (he had stated) by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom that person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy.' In the case of *Bank of Ireland* v. *Evans's Charities* (3) it was expressly held both that the negligence, in order to operate as an estoppel, must be a negligence 'in or immediately connected with the transfer itself,' and, further, that it must also be 'the proximate cause of the loss.' "

The principle thus enunciated seems to me to be sound; and, applying it to the present case, I am unable to say that the conclusions arrived at by the learned Judge who tried the cause, and all the Judges of the Court of Appeal are wrong, and I am of

(1) 2 H. & C. 181.
(2) 5 H. L. Cas. 389.
(3) 2 T. R. 70.
(4) 4 Bing. 254.
(5) 2 Ex. 654.

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opinion, therefore, that both grounds urged by the appellants fail, and that the judgment of the Court of Appeal should be affirmed.

Indeed, as has been affirmed by Lord Bramwell, in any view of this part of the case I cannot see how this objection can avail in respect of the earlier bills, which up to the 14th of May amounted to £3000, and up to the 27th of June £6000 more. Nothing is alleged to have been done or omitted, at all events at the first date, which could preclude the respondent from complaining of the prior payments.

Taking the view which I do of this case, it is unnecessary for me to advert to the alleged negligence of the bank in continuing to pay such large sums in cash over the counter, and not through a bank, further than to say that there is nothing in the evidence relating to the matter (which is very much in conflict), which, in my judgment, relieved the bank from their responsibility in respect of the payments complained of.

Judgments of the Court of Appeal and of the Queen's Bench Division reversed and judgment entered for the defendants with costs here and below; cause remitted to the Queen's Bench Division.

Solicitors for appellants: *Freshfields.*
Solicitors for respondents: *Hollams, Son, & Coward.*

[HOUSE OF LORDS.]

SUSANNAH SHARP . . . . . APPELLANT;

AND

WAKEFIELD AND OTHERS . . . . . RESPONDENTS.

H. L. (E.)
1891
March 20.

Inn—Licensed Persons—Public-house—Renewal of License—Discretion—Magistrates—Licensing Acts, 1828, 1872, 1874 (9 *Geo.* 4, *c.* 61, *s.* 1, 35 & 36 *Vict. c.* 94, *s.* 42, 37 & 38 *Vict. c.* 49, *s.* 26).

On the hearing of an application for the renewal of a license for the sale of intoxicating liquors under the Licensing Acts 1828, 1872, and 1874, the licensing justices have a discretion to refuse the renewal on the ground of the remoteness from police supervision and the character and necessities of the neighbourhood.

The decision of the Court of Appeal (22 Q. B. D. 239) affirmed.

APPEAL from an order of the Court of Appeal (22 Q. B. D. 239) affirming an order of the Queen's Bench Division (21 Q. B. D. 66).

The following are the material parts of a case stated for the opinion of the Queen's Bench Division by William Henry Wakefield, Chairman of Quarter Sessions for the county of Westmorland:—

On the 10th of September 1887 William Ridding duly applied to the Licensing Justices for the Kendal Division of Westmorland for a grant by way of renewal for the sale by him of all intoxicating liquors at the Low Bridge Inn, at Kentmere, in the county of Westmorland, and was refused such renewal.

Susannah Sharp, the owner of the inn, and a person aggrieved by such refusal, appealed in due form of law to the Quarter Sessions holden at Kendal, and the appeal was heard on the 21st of October 1887.

On the part of S. Sharp it was contended that on the hearing of an application for the renewal of a license under the Intoxicating Liquor Licensing Acts, 1828, 1872, and 1874, the Court

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was not by law entitled to inquire into the character and wants of the neighbourhood, or to refuse a grant by way of renewal upon such grounds.

The Court of Quarter Sessions overruled this contention, and after hearing evidence refused to renew the license on the ground of the remoteness from police supervision and the character and necessities of the locality and neighbourhood in which the inn is situate.

The question of law for the Court is whether the Court of Quarter Sessions was entitled to refuse the renewal upon the grounds stated.

If it were not so entitled the order of sessions is to be quashed, but if the Court should be of the contrary opinion then the order is to be affirmed.

An order nisi to quash the Order of Sessions on the ground of insufficiency was granted by the Queen's Bench Division, but was on the 30th of April 1888 discharged by Field and Wills JJ., and their decision was on the 15th of December 1888 affirmed with costs by the Court of Appeal (Lord Esher M.R., Fry and Lopes L.JJ.)

1891. Jan. 30, Feb. 2, 3. *Henn Collins* Q.C. and *Candy* Q.C. (*L. Sanderson* with them) for the appellant:—

The question is whether in a district where the justices have licensed more public-houses than are required for the wants of the inhabitants they can refuse the renewal of his license to a particular licensed person who is a fit and proper person and who has perhaps spent large sums of money in expectation of the renewal. The legislature cannot have intended to inflict such a loss of property. On a renewal, as distinguished from an original grant, of a license the only question for the justices is the fitness of the person and perhaps of the premises. The first Act for consideration is the Licensing Act of 1828 (9 Geo. 4 c. 61) which consolidated previous Acts. By sect. 1 the justices are to hold a general annual licensing sessions, and are empowered to grant licenses to such persons as they shall in the exercise of their discretion "deem fit and proper." But for the decisions it would now be contended that those words must be read literally

and that the discretion is limited to the fitness of the persons and the premises, but the authorities have long held that the needs of the neighbourhood might be considered. Sect. 4 provides for the transfer of licenses. Sect. 9 shews that the fitness "of the house intended to be kept" was a question for consideration. Sect. 10 provides for notices to be given as to applications for licenses, and sect. 14 for cases of death and other contingencies. Sect. 27, which gave a right of appeal to the Quarter Sessions from any act of the justices, is repealed by the second schedule of the Licensing Act 1872 except in so far as it relates to the renewal or the transfer of licenses. This repeal shews that the legislature intended to make a distinction between original grants of licenses and renewals of old. The schedule of the Act of 1828 gives the form of license, which is to a named person to sell &c. in a named house.

Then came the Licensing Act 1872 (35 & 36 Vict. c. 94). Sect. 30 deals with the disqualification of persons and premises by offences, and sect. 36 with registers of licenses, owners, premises, offences, &c. Sects. 37 and 38 introduce a new scheme as to the grants of new licenses, enacting that such grants shall not be valid either in counties or boroughs until confirmed by the county licensing committee and the whole body of borough justices respectively. No such confirmation is required in the case of renewals: and this is another distinction introduced by this Act. Sect. 42 makes the distinction even more marked: a licensed person applying for a renewal need not attend at the annual licensing meeting unless required by the justices; and no objection to the renewal shall be entertained unless written notice has been served on him. The words "subject as aforesaid" in the last paragraph shew that the discretion of the justices is to be exercised subject to the marked distinction between new licenses and renewals above pointed out: a licensed person is in a different category from a new applicant. Sect. 48 deals with the form of licenses and renewals, sub-sect. 2 enacting for the first time that a renewal may be made by an indorsement on the old license, or by the issue of a copy of the old license. Sect. 49 deals with six-day licenses, sect. 50 with removals, and sect. 56 with notice to owners of licensed premises in case of

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offences by tenants. Sect. 74 again distinguishes between new licenses and renewals, defining both.

Then came the Licensing Act, 1874 (37 & 38 Vict. c. 49). Sect. 22 deals with the provisional grant and confirmation of a license for a house about to be constructed in accordance with plans to be approved by the justices, which grant and confirmation are not to be valid unless declared to be final after the justices are satisfied that the house has been completed in accordance with the plans, and that no objection can be made to the character of the holder of the provisional license. The provisional license once granted, no objection can be taken on the ground that the house is not required for the wants of the neighbourhood; the legislature thus shewing that a person once licensed is regarded as one who having spent his money has earned a title to a license, defeasible only on the ground of unfitness.

Sect. 26 makes the distinction plainer: whereas by the Act of 1872, s. 42, no licensed person need attend unless required by the justices, now he shall not be required "save for some special cause personal to the licensed person:" i.e. for some objection to him personally, his character and fitness, and perhaps the fitness of the premises. It is suggested that these words have a wider meaning and were intended to alter the practice of requiring all holders of licenses to attend: but the appellant does not admit that since 1872 any such practice existed. Before 1872, no doubt, all holders were practically required to attend by sect. 12 of the Act of 1828. Looking at the whole course of legislation, even if the justices had under the Act of 1828 a discretion to refuse a renewal for any reason other than the fitness of the person or the premises (which it is contended they had not), they have no such discretion under the Acts of 1872 and 1874. The publican is the best judge whether the neighbourhood requires a particular house, i.e. whether it will pay to set it up; if he is willing to risk his money why should he not? Suppose two licensed houses in one district, and an objection to both on the ground that the population is diminished and only one is now needed; there would be great practical difficulty in determining which renewal to refuse. If the granting of a

license is not an actual bargain between the justices and the publican, he has at least a reasonable expectation of renewal: a refusal is harsh towards the publican who has spent his money and those behind him whose manager he is. The appellant's construction of the Act meets all the mischief aimed at: if a publican loses all his custom he ceases to be a fit and proper person, and the justices have a discretion to refuse a renewal.

As to the authorities, the most recent case, *Reg.* v. *Justices of Market Bosworth* (1), and *Reg.* v. *Justices of Liverpool* (2), contain dicta in favour of the appellant's contention. So do *Day* v. *Luhke* (3); and *Reg.* v. *Recorder of Dublin* (4). *Ex parte Martin* (5) is no doubt a decision the other way, but it should be overruled.

Addison Q.C. and *Poland* Q.C. (*James Paterson* with them) for the respondents:—

Long before the Act of 1828 the principle was established that the justices had the discretion which the appellant disputes: *Rex* v. *Young and Pitts* (6). The first Act on the subject was 5 & 6 Edw. 6 c. 25, which gave the justices an absolute discretion to "remove, discharge and put away" the selling of ale and beer where they should think meet and convenient. That Act and others which followed shewed the intention of the legislature to promote temperance and do not support the contention that a license was regarded as property. The previous Acts were consolidated by the Act of 1828, which by sect. 1 distinctly treats "persons keeping" and "persons about to keep" inns, alehouses and victualling houses, on the same footing. That Act gave the widest discretion to the justices in granting licenses, and the Acts of 1872 and 1874 in no way limit that discretion. The words in the Act of 1874 "for some special cause personal to the licensed person" mean some cause affecting himself; i.e. he shall not be required to attend unless his own license is objected to: but for this enactment every licensed person might be, and in some places was, required to attend at every licensing

(1) 56 L. J. M. C. 96.
(2) 11 Q. B. D. 638.
(3) Law Rep. 5 Eq. 336, 344.
(4) Ir. Rep. 11 C. L. 412, 430.
(5) 40 J. P. 133.
(6) 1 Burr. 556.

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sessions though he was not personally interested. *Reg.* v. *Smith* (1) is a distinct and strong decision against the appellant. Where the Legislature intended to limit the discretion of justices it expressed the intention plainly, as in the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27) ss. 8, 19.

The judgments of the Divisional Court and of the Court of Appeal state the reasons for the respondents' contention.

[They also relied on *Reg.* v. *Justices of Lancashire* (2); *Boodle* v. *Justices of Birmingham* (3); *Griffiths* v. *Justices of Lancashire* (4).]

Henn Collins Q.C. replied.

[LORD HALSBURY L.C. In view of the importance of the case, their Lordships will take time to consider the form of their decision.]

March 20. LORD HALSBURY L.C.:—

My Lords, I do not think at any period of the argument any of your Lordships doubted but that this judgment must be affirmed.

By the express language of the statute which is still the governing statute, the grant of a license is expressly within the discretion of the magistrates. For reasons to be stated presently, I am of opinion that no legislation has ever altered that provision; but if one were to argue a priori, what possible reason could there be for limiting the discretion of the justices to the first grant of the license? It is not denied that for the purpose of the original grant it is within the power and even the duty of the magistrates to consider the wants of the neighbourhood with reference both to its population, means of inspection by the proper authorities, and so forth.

If this is the original jurisdiction, what sense or reason could there be in making these topics irrelevant in any future grant? It surely must have been in the contemplation of the legislature that the circumstances of a neighbourhood might change, a population might diminish or increase. Would it be argued

(1) 48 L. J. M. C. 38.
(2) Law Rep. 6 Q. B. 97.
(3) 45 J. P. 635.
(4) 51 J. P. 453; 35 W. R. 732.

that if the population had very much increased at some point where by reason of its previous want of population no such public accommodation had been hitherto granted, no license should be granted because this additional grant might to some extent interfere with the practical monopoly enjoyed by the persons already licensed? This of course could not be argued since it is the well-understood practice to do this very thing. But can anything be more unreasonable than the suggestion that the legislature had given the discretion in one direction and withheld it in the other?

In real truth a great deal of the argument addressed to us on the part of the appellant has been less addressed to us upon the true construction of the Act of 1828, or the statutes which have followed it, but rather to some supposed injustice which the argument assumed would be so great if the matter were left to the discretion of the justices, that the legislature never could have intended to have entrusted them with a discretion so wide. I do not think that if the injustice were so great as it is suggested by the argument, that consideration could prevail over the plain language of the legislature. But I am not able to assent to the notion that the injustice is so great.

An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case* (1); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself: *Wilson* v. *Rastall* (2). So in *Reg.* v. *Boteler* (3), where justices thought proper not to enforce the law because they considered that the Act in question was unjust in principle, the Court of Queen's Bench compelled them by a peremptory order to do the act which nevertheless the statute had said was in their discretion to do or leave undone. So, again, in the case of overseers who

(1) 5 Rep. 100, a.
(2) 4 T. R. at p. 757.
(3) 33 L. J. M. C. 101.

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were required by 3 & 4 Vict. c. 61, to certify whether applicants for beer licenses were real residents and ratepayers of the parish, it was held that they were not entitled to refuse the certificate on the ground that in their opinion there were already too many public-houses, or that the beer shop was not required. So a discretion which empowered justices to grant licenses to innkeepers as in the exercise of their discretion they deemed proper would not be exercised by coming to a general resolution to refuse a license to everybody who would not consent to take out an excise license for the sale of spirits: *Reg.* v. *Sylvester* (1).

Again, justices were authorised to alter the hours for the sale of intoxicating liquors in any particular district; but it was held that though this was a general discretion given to them they had no right by virtue of a general resolution to alter the time in every case. They were required judicially to determine (although according to their discretion) what places, in the honest exercise of their judgment, required other hours for opening and closing than those specified. The question arose, in the case to which I am referring, on the proviso to sect. 2 of 25 & 26 Vict. c. 35, which was in these words: "Provided always that in any particular locality within any county, or district, or burgh, requiring other hours for opening and closing inns and hotels and public-houses than those specified in the forms of certificates in said schedule applicable thereto, it shall be lawful for such justices or magistrates respectively to insert in such certificates such other hours, not being earlier than six of the clock or later than eight of the clock in the morning for opening, or earlier than nine of the clock or later than eleven of the clock in the evening for closing the same, as they shall think fit." Eleven of the clock at night was accordingly the hour appointed for closing public-houses in Scotland, and the magistrates of Rothesay issued an order closing them at ten o'clock instead of eleven. Lord Selborne, in giving judgment in the House of Lords in that case, makes these observations: *Macbeth* v. *Ashley* (2): "Without meaning to deny that it is confided to the discretion of the magistrates to determine what particular localities require other hours for opening and closing than those

(1) 31 L. J. M. C. 93. (2) Law Rep. 2 H. L., Sc. at p. 360.

specified, it is obvious that such discretion as they have is not an arbitrary discretion to define any localities they please, but they must be such localities as they consider, in the honest and bonâ fide exercise of their own judgment, to require a difference to be made. The participle 'requiring' is connected with the substantive 'locality,' and therefore it must be a requirement arising out of the particular circumstances of the place. The magistrates must, in the exercise of an honest and bonâ fide judgment, be of opinion that the 'particular locality' which they except from the ordinary rule is one which, from its own special circumstances, requires that difference to be made."

I do not feel, therefore, though the language of the statute and the power given by that language is so great and so unqualified, that the mischief or danger apprehended by the appellant is at all likely to arise. The legislature has given credit to the magistrates for exercising a judicial discretion—that they will fairly decide the questions submitted to them, and not by evasion attempt to repeal the law which permits public-houses to exist, or evade it by avoiding a plain exposition of the reasons on which they act.

My Lords, I am very far indeed from saying that, assuming the complete discretion that I have indicated to exist, it would be likely that the persons exercising it would consider an original application in the same way as one which was applied for by the person who has already been licensed for one year. Of course, the justices would remember that a year before a license had been granted and presumably (unless some change during the year was proved) they start with the fact that the topics to which I have referred have already been considered, and one would not expect that those topics would be likely to be reopened, unless, as I say, some change has been proved. This would be likely to limit the inquiry to the conduct of the house and the character of the licensee, and, perhaps, the condition of the house, but as matter of fact and not as matter of law at all.

My Lords, as to the question of law arising upon the language of all the statutes, it may, in my judgment, be very shortly disposed of. The first statute to which we need go back, it is admitted, gives discretion. Does any Act passed since purport

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to withdraw it? Certainly not. On the contrary, the Acts referred to expressly retain it, subject to certain provisions which it cannot be pretended affect to exclude the topics which, it is argued, are topics irrelevant to a renewal.

Now, I do not mean to say that a repeal or qualification may not sometimes be implied by subsequent statutes enacting something inconsistent with a previous Act, but in a matter so constantly before the legislature as the licensing laws, I cannot but think that if it was intended to alter the law in this respect it would have been done in plain and unambiguous language. Now, the Acts of 1872 and 1874, which are the Acts upon which reliance is placed, do not profess to limit the discretion, but enact certain new procedure—all of which procedure is perfectly consistent with the preservation intact of the discretion given to the magistrates. I do not think it is necessary to go into details as to the alteration of procedure—it is merely procedure. It leaves the earlier Act absolutely untouched upon the subject now in debate, and I entirely approve of and adopt the decision of Cockburn, C.J., and Mellor, J., arrived at thirteen years ago.

I, therefore, think that this appeal ought to be dismissed with costs.

LORD BRAMWELL:—

My Lords, I think this a very plain case, and that the judgment should be affirmed. Houses of public entertainment and for the sale of drink have been in this country and in many others the subject of regulation for police purposes; not for what one may call economic purposes, like the fixing of the price of bread or the wages of labour, but for the maintenance of order. And naturally the buildings themselves, their character, their number, and their neighbourhood have been considered as well as the persons who should be permitted to carry on the trade or business. That certainly has been the case in England; and it is undoubtedly so now with respect to licenses granted to sell drink on premises for the first time. This is so clear that the learned counsel for the appellant have not contended to the contrary. If an application is made for a license to sell drink on premises not before licensed, it is certain that the magistrates may refuse

it, and may refuse for the reason and no other than that they think the neighbourhood does not need it; that none is needed, or none in addition to the houses already licensed. But it is said that this power or right in the magistrates does not exist where a license has been granted and the question is whether it should be renewed. I am not sure that this contention might not be met by this. The magistrates have a discretion to refuse; they are not bound to state their reason, and therefore their decision cannot be questioned. But I think it better to say that in my judgment if they had to state their reasons, it would be a good one in point of law that they refused to renew on the ground of the remoteness from police supervision and the character and necessities of the locality and neighbourhood in which the said inn is situate. Of course, the finding of the facts by the sessions is conclusive.

Two objections are raised by the appellant. One is, that though by the Act 9 Geo. 4, c. 61, the above might be a good ground for a refusal of a license applied for for the first time, it is not for a refusal of its renewal. Why, I know not. I quite agree that different considerations should operate on the minds of the justices, and, I doubt not, do. The hardship of stopping the trade of a man who is getting an honest living in a lawful trade, and has done so, perhaps, for years, with probably an expense at the outset, may well be taken into consideration; but it must be done so in conjunction with considerations the other way, and must be left to the discretion of the justices. The license is a renewal. That word has been criticised. It may be misleading, but is, I think, correct. It is a "renewal"—i.e., a new license, as we talk of a new lease being a renewal, though parties and terms may be wholly different. And one cannot help seeing this, that if the discretion was to be limited, as contended in the case of a renewal, the legislature might have said so in terms, and has not. Whenever that is the case it seems to me that Courts ought not to put a limit on general words without almost a necessity for doing so.

The other objection is that subsequent legislation has shewn that Parliament intended there should be a difference between the treatment of original applications for a license and

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applications for renewals, and has shewn that it intended the license should be renewed except for objection to the licensee; at all events, that its renewal should not be refused for such a reason as existed in this case, and so the power to refuse on that ground has been taken away by the legislature. I cannot find this. I do find, indeed, that the legislature in its subsequent Acts contemplated that as a rule, as a practice, licenses would be renewed. But there is nothing to shew that the discretion to refuse is taken away. The word "personal," so much relied on, means "individual," as distinguished from the class to which he belongs. And I repeat my remark that it could have been so enacted, and there is nothing to justify implying such a repeal.

Indeed, I think this argument presents a consideration unfavourable to the appellants. The legislature has most clearly shown that it supposed, contemplated, that licenses would usually be renewed; that the taking away of a man's livelihood would not be practised cruelly or wantonly. True, and because it shewed that plainly it may have felt it safe to leave an absolute discretion with the justices, a discretion that would be discreetly exercised. And it has been. I do not say in this case, I know nothing about it; I mean by justices generally. That is shewn by what was mentioned by Mr. Poland, viz., that at the sessions, when there is an appeal against a refusal of a first license, the appellant begins, the burthen of proof is on him, he has to make out that he ought to have a license. Where, on the other hand, the appeal is against a refusal to renew a license, the respondents begin, the burthen of proof is on them, they have to make out that he ought not to have a license; practically, that his license should be taken from him. This, Mr. Poland says, is the practice throughout England. One may well suppose this to be known to the legislature, and to be one cause why the justices are trusted with such extensive power.

For these reasons, I think the appeal should be dismissed. Thinking, indeed, that the legislature contemplated that ordinarily licenses would be renewed, and have most strongly shewn that, but thinking also that that does not help the appellant's counsel to shew, and that they have not shewn that a renewal may not be refused for the reason given in this case.

LORD HERSCHELL :—

My Lords, the sole question for decision in this case is, whether where a license is applied for, by way of renewal, by one who already holds a license for the sale of intoxicating liquors, the licensing authorities are entitled to take into consideration the wants of the neighbourhood and the remoteness of the premises from police supervision, or whether their inquiry must be limited to the character and conduct of the applicant, and they can only refuse the applicant on the ground of his personal unfitness.

It was admitted by the learned counsel for the appellant that there was authority for the proposition that a complete discretion had been vested in the justices to grant or withhold any application for a new license, though they somewhat faintly contended that, upon the true construction of the first section of 9 Geo. 4, c. 61, this discretion was confined to the question whether the applicant was a fit and proper person to hold the license, and whether the premises in respect of which he made the application were suitable for the purpose. It is to my mind abundantly clear that this is not a correct view of the statute. Giving to the language used its natural interpretation, I think it impossible to do otherwise than hold that the discretion of the justices is not in any way fettered.

When once this conclusion is arrived at, it seems to me to follow that the justices had under the statute of Geo. 4 the same discretion when the holder of a license applied for another license for the ensuing year. It is by virtue of the very same enactment that the justices are empowered to grant such a license. The statute makes no distinction between this case and the original application. The word "renewal" is never mentioned, and it is expressly provided that every license granted under the authority of the Act shall last for one year "and no longer."

But it was argued that the law had been modified by subsequent legislation, and this was the point mainly insisted upon on behalf of the appellant.

The Licensing Act of 1872, has, it is true, by sect. 42, altered in some respects the procedure provided in relation to applications for licenses by the statute of Geo. 4. But the

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alterations have reference to matters of procedure only. Under the earlier Act, the applicant for a license was required to attend in person unless hindered by sickness, infirmity, or other reasonable cause. The Act of 1872 provided that in case of an application for the renewal of a license, the applicant need not attend in person at the annual licensing meeting, unless required by the justices so to attend. It also contained enactments securing to the applicant for a renewal of his license notice that objection was taken to such renewal, and prescribed that no evidence with respect thereto should be received by the justices that was not given on oath.

These provisions would obviously have left the discretion of the justices just what it had been before, even if the statute had not gone on, as it does, to provide that, subject thereto, licenses should be renewed, and the powers and discretion of justices relative to such renewal should be exercised as theretofore. But it was said that the amendment of s. 42 of the Licensing Act, 1872, enacted in sect. 26 of the Licensing Act, 1874, had the effect of limiting the power of the justices and prohibiting them from refusing to grant a renewal of a license save for some cause personal to the applicant. The enactment in question certainly does not in terms contain any such provision, and I do not think it is possible to infer from the language used that the legislature intended thus to alter the law. The section, after reciting that it was enacted by s. 42 of the Act of 1872, that an applicant for the renewal of his license need not attend in person at the annual licensing meeting, unless required by the licensing justices so to attend, enacts "that such requisition shall not be made save for some special cause personal to the licensed person to whom such requisition is sent." I think the object of this provision is obvious. Under the earlier Act, the justices at any sessions might (or at the very least it was open to contention that they might) have required all applicants for a renewal to attend as before. The later Act prescribes that no such requisition is to be made except for some special cause personal to the recipient of the requisition.

The cause, it will be observed, is to be a cause requiring the individual to be present, and the fact that objection was taken

to the renewal of his license would be such a cause. The language of the statute has no reference to the causes which, when the applicant attends in pursuance to the requisition, may operate in the minds of the justices to determine whether his application shall be acceded to or not.

For these reasons I think that the judgment of the Court below was correct and ought to be affirmed.

There is one observation made by my noble and learned friend the Lord Chancellor, to which I am not prepared to give my assent without qualification. I do not think the fact that a license had been granted for the previous year would be sufficient ground for the justices presuming that the licensed house was then needed and considering only whether the circumstances had changed in the interval. It might well be that the attention of the licensing justices had not on the former occasion been called to the condition and wants of the neighbourhood.

LORD MACNAGHTEN:—

My Lords, for the reasons which have been stated by my noble and learned friends, and which it is unnecessary for me to repeat, I also am of opinion that it is clear beyond the possibility of doubt or question that the Act of 1828 conferred upon the licensing justices the same discretion in the case of an application for what is now termed a renewal, as in the case of a person applying for a license for the first time, and that there is nothing in the subsequent legislation to do away with or impair or fetter that discretion, although there has been an alteration in procedure in favour of applicants for renewed licenses.

LORD HANNEN:—

My Lords, I do not consider it necessary to occupy your Lordships' time with observations on the 9 Geo. 4, c. 61. It was long ago decided, and I think rightly decided, that the justices were under that Act entitled and bound to consider the needs of the neighbourhood on an application for a license to a person seeking to keep a house for the sale of exciseable liquors, and that their discretion was equally wide in the case of a person already

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keeping such a house, as in one where the application was by a person not before licensed.

But it was contended that the general discretion given by the Act of Geo. 4 was restricted by the Act of 1872 (35 & 36 Vict. c. 94), and by the Act of 1874 (37 & 38 Vict. c. 49). By the first of these Acts the renewal of licenses is dealt with, and by the 42nd section certain changes are made in the procedure where a renewal is asked for. (1.) The applicant need not attend in person unless required by the justices to do so. (2.) No objection to the renewal is to be entertained unless written notice of the intention to oppose has been served seven days before the meeting, and (3.) Evidence with respect to the renewal shall be given on oath. But the section concludes: "Subject, as aforesaid, licenses shall be renewed, and the power and discretion of justices relative to such renewal shall be exercised as heretofore." This, therefore, clearly leaves the discretion of the justices unfettered, where the provisions of the 42nd section have been complied with.

The argument for the appellant was chiefly based on the qualification of the above-mentioned 42nd section of the Act of 1872, added by the first clause of the 26th section of the Licensing Act of 1874 (37 & 38 Vict. c. 49). That clause is as follows: "Whereas by sect. 42 of the principal Act, it is enacted that a licensed person applying for the renewal of his license need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend. Be it enacted that such requisition shall not be made, save for some special cause personal to the licensed person to whom such requisition is sent."

Rightly to understand this enactment it is necessary to revert to the earlier legislation on the subject of the personal attendance of applicants for licenses. By the 12th section of the Act 9 Geo. 4, only those applicants were excused from personal attendance who could prove by sworn testimony that they were hindered by sickness, or infirmity, or by any other reasonable cause, in which case an authorized person might attend for them. The 42nd section of the Act of 1872 excused the applicant for a renewal of his license from attendance unless required by the

justices. This left it in the power of the justices to require the attendance of all applicants for renewed licenses. This power might be exercised so as to cause inconvenience to applicants required to attend on grounds not having reference to their particular case.

Instances have been brought before the Courts where justices have expressed and acted upon a general intention with regard to all licenses, whereas it is their duty to consider each individual case on its own special merits. The object of the 26th section of the Act of 1874 appears to be to enforce this duty, and to require the justices to particularise the special ground on which they consider the personal attendance of the applicant necessary. The word "personal" is fully satisfied by construing it as meaning "for a cause in which the applicant is personally interested, and not merely interested as one of the general body of licensed persons."

For these reasons it appears to me that the judgment appealed from is correct and should be affirmed.

Judgment appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 20th March 1891.

Solicitors for appellant: *Peckham, Maitland, & Peckham, for F. W. Watson, Kendal.*

Solicitors for respondents: *Nicol, Son & Jones, for John Bolton, Kendal.*

[HOUSE OF LORDS.]

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DOWSE AND OTHERS . . . . . APPELLANTS;

AND

ANN ELIZABETH GORTON AND JAMES WILLIAM GORTON, AND GEORGE GRAY, RICHARD JAMES RILEY, AND WILLIAM SYKES . . . . . RESPONDENTS.

Administration—Executors—Assets of Testator—Power of Executors to carry on Business—Right of Executors to Indemnity—Rights of Creditors of Testator and subsequent Creditors of Executors.

A testator's business was carried on for about three years by his executors after his death in accordance with the provisions of the will and with the assent of the testator's creditors, in the interest of the creditors as well as of the beneficiaries, and was properly carried on:—

Held, that the executors were entitled (in priority to claims by the testator's creditors) to be indemnified out of the testator's estate against the liabilities which they had properly incurred, and that the indemnity was not limited to that portion of the assets which had come into existence or changed its form since the testator's death.

The decision of the Court of Appeal (40 Ch. D. 536) varied accordingly.

APPEAL from an order of the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), (1), varying a judgment of Sir H. F. Bristowe, Vice-Chancellor of the County Palatine of Lancaster.

The following statement of the facts is taken from the judgment of Lord Macnaghten:—

John Gorton, a Manchester manufacturer, died on the 30th of December 1883.

At the time of his death he was carrying on two distinct businesses, one at Lark Hill Mills, Middleton, as a yarn dyer and polisher, and the other as a small ware manufacturer in Anvil Street, Manchester.

By his will, dated the 30th of November 1883, he appointed the respondents, Ann Elizabeth Gorton, his wife, and James

(1) 40 Ch. D. 536.

William Gorton, his son, to be his executors. After a specific bequest to his wife, he gave his real and personal estate to his executors upon the usual trusts for sale and conversion, with a direction to invest the residue after payment of debts and legacies for the benefit of his wife and children. And he empowered his executors to continue any business in which he might be engaged at the time of his death, and to employ therein such part of his estate as they should think desirable.

Besides debts owing to trade creditors, and some other debts of small amount, all of which it is said have been paid, Gorton was at the time of his death indebted to his bankers on an overdraft, which was secured on his Middleton property. He was also indebted to his sister, Mrs. Caldwell, in the sum of £4000, and to the appellants as executors of one Turner, who died in December 1874, in the sum of £8487 5*s.* 1*d.*

The debt to the appellants arose in this way. The Anvil Street business, which was carried on upon a mill rented from Messrs. Birley & Co. at £272 per annum, had belonged to Turner. Gorton and a partner of his, whose interest Gorton afterwards acquired, bought it from Turner as a going concern for £19,487 5*s.* 1*d.*, under an agreement dated the 25th of September 1874. £2000, part of the purchase money, was paid down when the agreement was signed. The balance was to be paid by instalments of £1500 on the 26th of September in each year. Interest at the rate of £5 per cent. per annum on the balance for the time being remaining unpaid, was to be paid half-yearly in March and September. In case of any default the whole balance then remaining unpaid was to become immediately payable. No part of the machinery was to be sold or removed before the completion of the purchase without the consent of Turner or his executors. In the meantime the machinery was to remain the property of the vendor. The business was to be carried on under the supervision of two inspectors named in the agreement, or their successors, to be appointed by the vendor, subject to the approval of the purchasers. It was provided that if the inspectors should at any time not be satisfied with the carrying on of the business, or if the business should be discontinued, they might at once enter and dispossess the purchasers and take possession of the

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machinery and sell it, and apply the proceeds towards the payment of the balance then due.

At the time of the testator's death, £11,000 had been paid for principal. Interest on the balance had been paid up to the preceding 12th of September. But three instalments of £1500 each were in arrear.

The estate of the testator, at the time of his death, consisted almost entirely of the assets of the Middleton business, and his interest in the assets of the Anvil Street business.

About a week after the testator's death, two of the appellants, one of whom seems to have been himself an inspector of the Anvil Street business under the agreement of 1874, called upon James William Gorton, at the testator's place of business. He explained to them the general position of the estate and the indebtedness of the testator, especially with regard to the amount due to Mrs. Caldwell, and the overdraft owing to the bank, and he pointed out to them that he and his co-executrix were then carrying on the testator's businesses as carried on by the testator at the time of his death. He represented to them that if the Anvil Street business was continued the interest on the debt owing to Turner's executors would be paid as usual, and that "he hoped after a time to pay instalments to reduce the debt." James William Gorton says that they told him that he and his co-executrix had better continue the businesses of the testator. They deny that they used that particular expression. But it is plain that they assented to the businesses being continued, and, in fact, according to their own account, they went so far as to make suggestions in regard to their future management.

The testator's will was proved by his widow and his son, whom I shall hereafter refer to as the executors. They continued both businesses under the style of "The Executors of John Gorton & Co." Balance-sheets of the Anvil Street business, and stock-taking accounts of the Middleton business, were regularly furnished to the appellants, and they were regularly paid interest on their debt down to the 12th of March 1887.

In August 1887 the executors found themselves unable to go on any longer, and they called their creditors together.

On the 14th of October 1887 the appellants brought an

action in the Palatine Court for the administration of the testator's estate, asking for the usual accounts, and for a receiver and manager of the testator's businesses.

A few days afterwards they issued an originating summons with the object of having it declared that the book debts, stocks, and other assets of the businesses carried on by the executors ought to be applied in payment of the debts due by the testator at the time of his death, in priority to any claim for indemnity by the executors or the persons with whom they had dealt. The summons also asked for the usual administration order and the appointment of a receiver and manager. To this summons, at the instance of the Vice-Chancellor, the respondents, Gray, Riley, and Sykes, were made parties as representing the creditors of "The Executors of John Gorton & Co."

On the 23rd of November 1887 in the action, and on the summons, the Vice-Chancellor made an order in the usual form for the administration of the testator's estate, but he prefaced the order by a declaration that all the book debts, stock, and other assets of the businesses carried on by the testator at the time of his death, and at the date of the order due and owing in respect of the said businesses or either of them or belonging to the same, ought to be applied in payment of the debts due by the testator at the time of his death, in priority to any claim of the executors for indemnity in respect of liabilities incurred in carrying on the said businesses, or to any claim of the persons with whom the executors had dealt.

On appeal by the respondents Gray, Riley, and Sykes, the order of the 23rd of November 1887 was varied by omitting the declaration made by the Vice-Chancellor, and in lieu thereof it was declared that the executors were entitled as against, and in priority to, the persons to whom the testator was indebted at the time of his death to be indemnified out of such part of the estate as had been acquired by the executors since his death against debts or liabilities incurred by them in carrying on his businesses to the full amount of such debts and liabilities, or if the executors should be in default to the estate, then to the full amount of such debts and liabilities after deducting the amount in respect of which the executors were so in default, and it

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was declared that the persons with whom the executors had dealt in carrying on the said businesses, and to whom they were under any debts or liabilities, were to be substituted for or subrogated to the right of the executors with regard to the said indemnity as to such debts and liabilities, and an additional account and further inquiries consequential on that declaration were added.

The appellants complain of the order of the Court of Appeal so far as it varies the order of the 23rd of November 1887, and they contend that the declaration of the Vice-Chancellor ought to be restored.

The arguments are dealt with in the judgments, and the following outline as to the point of law in question will suffice for the present report.

Mar. 12. Sir *Horace Davey* Q.C. and *Alfred Hopkinson* for the appellants :—

The assets acquired since the testator's death in carrying on his businesses formed part of his estate, and ought to be applied in satisfaction of the debts owing at his death in priority to any claim by his executors for indemnity against debts and liabilities contracted since his death. The legal assets of the testator vested in the executors quâ executors only, and could not have been taken in execution by creditors of the executors: *Abbott* v. *Parfitt* (1); *Moseley* v. *Rendell* (2); Com. Dig. "Assets" (C); Godolphin's Orphan's Legacy p. 93. Williams on Executors Part 4 Book I. chap. I; *Pillgrem* v. *Pillgrem* (3); *Cutbush* v. *Cutbush* (4); *Lucas* v. *Williams.* (5)

The right to an indemnity can be only against those for whose benefit and at whose risk the businesses were carried on, i.e. the beneficiaries under the will. The right of a trustee to an indemnity is only against his cestui que trust. The testator's estate was at his death ample to pay his liabilities; his creditors ought not to be in a worse position now than then. If it be necessary to resort to the argument, the executors are estopped from saying the estate was not then solvent. The payment of

(1) Law Rep. 6 Q. B. 346.
(2) Ibid. 338.
(3) 18 Ch. D. 93.
(4) 1 Beav. 184.
(5) 4 D. F. & J. 439.

interest by the executors was an admission of assets so as to make them liable; *Attorney-General* v. *Chapman*. (1)

Cozens-Hardy Q.C. and *S. Hall* Q.C. (*Staffurth* with them) for those respondents who were creditors with whom the executors had dealt in carrying on the testator's businesses since his death, referred to the forms of fi. fa. as against executors in Chitty's Forms, and contended that the indemnity ought not to have been limited as it was by the Court of Appeal.

A. C. Maberly for the testator's executors was not heard.

Sir *H. Davey* Q.C. replied.

The House took time for consideration.

May 12. LORD HERSCHELL:—

My Lords, this is an administration action brought by the appellants, who are the executors of one Luke Turner, to have the estate of John Gorton, of whom they were creditors, administered. The defendants, Ann Elizabeth Gorton and James William Gorton, are the executors of John Gorton. The other defendants are persons who have become creditors of these executors in respect of goods supplied for the purpose of the businesses of the testator which were carried on by them after his death. The appellants by an originating motion claimed to have it determined whether the assets of the businesses carried on by the testator at the time of his death, and then due and owing in respect of the said businesses, or belonging to the same, ought to be applied in payment of the debts due by the testator at the time of his death in priority to any claim of his executors for indemnity.

The debt due to the appellants arose under an agreement made between their testator, Luke Turner, and the testator in the administration suit on the 25th of September 1874. By this agreement Luke Turner agreed to sell his business of an elastic braid manufacturer to John Gorton and William Shemilt (who parted with his share to John Gorton and afterwards died),

(1) 3 Beav. 255.

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and his interest in the mill, machinery, and other effects for £19,487, of which £2000 was to be paid on the agreement being signed, and the balance with interest by annual instalments of £1500 each, on every 26th of September, until the whole of the purchase-money was paid. In case of default in payment of either principal or interest the whole balance of purchase-money was to become due immediately. The £2000 was paid on the execution of the agreement, and John Gorton paid the annual instalments of £1500 down to the 26th of September 1880. But at the time of his death on the 30th of December 1883, three of the annual instalments remained unpaid, although the interest on the unpaid purchase-money had been paid to the 12th of September previous. Besides the business purchased from Luke Turner, Gorton also carried on the business of a yarn polisher upon other premises. By his will he gave uncontrolled discretion to his executors to carry on his businesses for such periods as they should think desirable. They accordingly continued the same until September 1887, when they stopped payment and called the creditors together. Prior to this date they had paid all the debts of the testator, except the debt due to the appellants, and £4000 owing to Mrs. Caldwell, a sister of the testator, but they had incurred other liabilities in respect of the carrying on of the testator's businesses. Shortly after the death of John Gorton, the solicitor then acting for his executors produced to the appellants' solicitor a statement purporting to show the assets of the businesses as exceeding the liabilities. But in this statement the mill, works, and machinery were valued at their cost price.

James William Gorton, one of the respondents, states in his affidavit that very shortly after his testator's death, he saw the appellants Barrs and Hasleham, and explained to them the general position of the estate. He adds: "I also pointed out to them that I and my co-executrix were then carrying on the said businesses as carried on by the testator at the time of his death, and they informed me that we had better continue to do so." In an affidavit in answer to this statement, Barrs and Hasleham deny that they ever informed J. W. Gorton that he and his co-executrix had better continue the businesses of the testator.

They say, "The said J. W. Gorton represented to us that if the Anvil Street business was continued, the interest on the debt owing by the said John Gorton at his decease to the executors of the said Luke Turner, would be paid as usual, and that he hoped after a time to pay instalments to reduce the debt, and we made some suggestions as to reducing the expenses of the businesses, and he promised to reduce the expenditure accordingly." Balance sheets of the Anvil Street business for the years 1884, 1885, and 1886 were regularly submitted to the appellants in accordance with the provisions of the agreement of 1874, and an account of the stock-taking of the other business was also regularly furnished to them.

The Court of Appeal, by the judgment now under the consideration of your Lordships, made a declaration in these terms: "That the executors of John Gorton are entitled, as against and in priority to the persons to whom he was indebted at the time of his death, to be indemnified out of such part of the estate as has been acquired by the executors since his death against debts or liabilities incurred by the said executors in carrying on his businesses to the full amount of such debts and liabilities, or if the said executors be in default to the said John Gorton's estate, then to the full amount of such debts and liabilities, after deducting the amount in respect of which the executors are so in default."

The right of the executors to an indemnity out of such part of the estate as has been acquired by them since the death of the testator, and the limitation of their indemnity to that part of the estate appears to have been based, in the judgment of Lindley L.J., upon the view that this after-acquired property was not assets of the testator against which his creditors could have execution. He says, "Now what is the right of the creditor of the deceased? He is a creditor, he has no equitable rights as distinguished from legal rights against the assets of the deceased. His right is to sue the executor at law, and get a judgment at law de bonis testatoris, and under that to seize under a fi. fa. the assets of the deceased in the hands of the executors at the time of his death. But he has nothing to do with future acquired property." Cotton L.J., I gather, took the same view, though he does not state the proposition definitely. After saying that

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the executors could not, so far as regards the original assets of the testator, claim an indemnity as against the creditors of the testator, he continues: "Where there are liabilities undertaken under the direction of the testator's will, they are entitled to an indemnity in respect of them out of the assets acquired by the executors after the testator's death. The creditors of the testator say there are assets of our testator, and he could not, by declaring a trust for you to perform, give you any right of indemnity as against the property. That is not correct."

With all deference, I am unable to concur in the distinction drawn between the assets which come into the hands of the executors at the time of the death of the testator, and property which, in their capacity of executors, they afterwards acquire. The case of *Abbott* v. *Parfitt* (1) appears to be a distinct authority that property so acquired is as much assets of the testator as that which was in his possession at the time of his death. It was there held that the price of goods sold to the defendant by the executors, who had carried on their testator's business, no part of the materials of which had belonged to the testator, would, when recovered, be assets of the testator; and I do not think it is possible, on principle, to maintain the suggested distinction.

Could an executor having property in his hands, to which his only title was that of executor, plead to an action by a creditor plene administravit? It seems to me that such a question admits of but one answer. I could indeed understand the view that, if the executors had come under liability in acquiring any asset in their hands, they would be entitled to an indemnity against such liability out of that asset before it could be made available for creditors. But this is not the effect of the declaration made by the Court below. All after-acquired property, however acquired, even though it has been purchased with the proceeds of the sale of a part of the estate possessed by the testator at the time of his death, is treated as one subject-matter out of which the executors are entitled to their indemnity. I cannot think that the executors can be so entitled, if they cannot make good their claim to an indemnity generally, against the whole of the testator's estate.

(1) Law Rep. 6 Q. B. 346.

I think it is clear that where a business has been carried on under such an authority as was conferred upon the executors by the will of this testator, they would be entitled to a general indemnity out of the estate as against all persons claiming under the will. But I take it to be equally clear that they could not, by reason only of such authority, maintain this right against the creditors of the testator. The executors would, no doubt, be entitled to carry on a business of the testator for such reasonable time as was necessary to enable them to sell his business property as a going concern, and would even, as against his creditors, be entitled to an indemnity in respect of the liabilities properly incurred in so doing. But, in the present case, the businesses were carried on for a period of three years; and it is obvious that this was not done merely for the purpose of effecting a sale.

I agree with the contention of the learned counsel for the appellants, that the mere fact that a creditor stood by under such circumstances, and did not immediately take steps to enforce his debt, would not of itself entitle the executors, as against him, to be indemnified out of the estate. But when all the circumstances of the case are considered, I do not think this is the true view of them.

It is necessary to look somewhat closely at the position of affairs at the time of the testator's death, and at what took place afterwards. Three of the annual instalments of £1500 each were then overdue, and, although a balance sheet was exhibited to the appellants which disclosed a large surplus, it was on the face of it shewn to be arrived at by valuing all the business premises and machinery at cost price. Any business man must have known, not only that this would be wholly different from the breaking-up price, but that it did not afford any real measure of what could be obtained if the sale were of a going concern, to say nothing of the uncertainty of finding a purchaser for such a subject. I do not place any reliance upon the allegation, denied by the appellants, that they informed one of the executors that the business had better be continued. But before referring to the statement which they admit they made, I must bring to your Lordships' notice some of the provisions in the agreement under which the debt was incurred, to which I have not hitherto

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adverted, but which appear to me to have a material bearing upon the question to be determined. Luke Turner, when he sold his business and premises to the testator Gorton, was not content to rely merely on his general credit for payment of the purchase money. He required the purchasers to agree that they, and the survivor of them would, until the whole of the purchase money was paid, carry on the business to the best of their skill and ability. The business was to be carried on subject to the supervision and inspection of William Barrs and John Wilkinson. The purchasers also undertook to keep proper books and accounts, and to furnish from time to time balance sheets, shewing the state of the business; and the inspectors or other persons appointed by Luke Turner, or his executors, were authorized, if not satisfied with the carrying on of the business, or if it was discontinued, to enter upon the premises and dispossess the purchasers, and to take possession of the engine, machinery, and other effects assigned. I agree with the Vice-Chancellor of the County Palatine, that the agreement to carry on the business applied only to the purchasers, and did not extend to the executors of the survivor of them. Nevertheless I think the provisions I have just recited throw considerable light upon the action of the appellants. They knew that if the businesses were sold, there was a risk that the estate would not realise enough to pay their debt, and they knew too what powers they possessed as regards the Anvil Street business, under the agreement of September 1874. They were aware also that the testator's businesses were being carried on; they received from time to time balance sheets shewing the result of the trading; and they admit that at the interview with J. W. Gorton shortly after the testator's death, he told them that if the Anvil Street business were continued he hoped, after a time, to pay instalments to reduce the debt, and that they made some suggestions as to reducing the expenses of the businesses. Under the circumstances I think the proper inference is that the businesses were not merely continued for the benefit of those interested under the will, but that they were also carried on with the assent of the representatives of Luke Turner, for the purpose of securing the payment of the debt due to them.

If this be the true view it can hardly be contested, that the executors of Gorton are, as against the appellants, entitled to be indemnified out of their testator's estate, against the liabilities which they have properly incurred. The declaration of the Court below gives them a more limited remedy. The difference is probably in the present case not a practical one. But the declaration as it stands directs an unnecessary and what may be an expensive inquiry. I think, therefore, that the order ought to be varied by omitting the limitation upon the indemnity and the consequent inquiry.

Since writing my opinion I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Macnaghten. It is not necessary to determine in the present case what would be the proper order if the appellants had alleged and established that the businesses of the testator had as against them been carried on without lawful authority, but I am disposed to concur in the view which he has expressed as to the right of a creditor under such circumstances.

I understood it to be stated at the bar that it had been agreed that the costs of both parties should come out of the estate. This appears to have been the course taken in the litigation hitherto. And I do not advise your Lordships to interfere with the existing order as to costs. But I do not think your Lordships ought by your judgment to relieve the appellants in a suit of this nature from paying the costs of the appeal. The respondent executors should have the difference (if any) in the costs taxed as between party and party and taxed as between solicitor and client out of the estate.

LORD MACNAGHTEN (after stating the facts as given above, proceeded thus:—)

On the question as presented to your Lordships I have not been able to find so much assistance as I could have wished, either in the judgment of the learned Vice-Chancellor, or in that of the Court of Appeal. The Vice-Chancellor treats the question before him as arising on a direct claim by the creditors of the businesses carried on by the executors to be paid out of the assets pari passu with the persons who were creditors of the testator at

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the time of his death. And the whole of his judgment from first to last is devoted to combating that claim, and some very insufficient reasons on which it seems to have been founded. I need hardly remind your Lordships that no such claim was made at your Lordships' bar. The persons with whom the executors dealt, and who are still unpaid, did not claim to be creditors of the testator. Besides their right against the executors personally, the only right they asserted was the right to stand in the place of the executors against the assets, and to have the benefit of such indemnity as the executors might prove to be entitled to. I turn to the judgment of the Court of Appeal, but that is more disappointing still. The Lords Justices assume, as a matter not open to controversy, the only point which was really in contest here. Without explanation or comment they take it for granted that the testator's businesses were continued for the benefit of his creditors.

Under these circumstances it is, I think, necessary to begin at the beginning and to examine the case made by the appellants who were, as I have said, plaintiffs in the action and applicants on the summons.

Your Lordships are familiar with the distinction between the usual administration order and an order founded on breach of trust—a distinction in principle which is not affected by the recent changes in practice and procedure. Keeping this distinction in view, I would ask your Lordships to observe that neither in the pleadings nor in the evidence are the executors charged with wilful default or any other misconduct. The writ in the action asks for the usual order, coupled with the appointment of a receiver and manager of the testator's businesses, and it asks for nothing more. No statement of claim was delivered and no affidavits were filed in the action. The summons, on which alone affidavits were filed, also asks for the usual order. And, indeed, I apprehend it would not be competent for an applicant on an originating summons to ask for or obtain otherwise than by consent an order founded on breach of trust or inquiries pointing to wilful default. Moreover it will be observed that both the writ and the summons treat the two businesses in their then actual state and condition as part of the testator's estate.

So far the case is perfectly consistent, and the proper relief is asked.

I now come to what is, in my opinion, a startling inconsistency. Asking for the usual order, the summons also asks in effect for a declaration that the executors are not entitled as against the testator's creditors to any indemnity in respect of liabilities incurred in carrying on the testator's businesses. In other words the appellants adopt the action of the executors, and take the fruits of their exertions in specie, and at the same time, and for that very same action, they claim to visit them with the loss of all their expenditure, and that without raising any issue which the executors could meet—without any finding that the assets have been wasted—without even any allegation of misconduct. On what ground, I ask, is this claim based? Is it merely on the ground that the executors have traded without authority and beyond the period required for getting in the assets? Then the claim must hold good whether the trading brings a profit or a loss. The result of the trading is immaterial. Is it on the ground that the trading has diminished the assets? There is no finding on the subject. There is no admission to that effect. There is no inquiry to ascertain the result of the trading. The penalty invoked is not measured by reference to loss or diminution of assets.

My Lords, there is not, I believe, a shadow of authority for such a claim as that put forward by the appellants. It is contrary to all principle. Creditors of a deceased trader whose business has been continued by his executors, when they come for an administration decree, must treat the continuance of the business either as proper or as improper. If the business has been properly continued as between the executors and the creditors, or if the creditors choose to treat it so, which comes to the same thing, the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on. If it has been improperly continued and the creditors choose to treat the continuance as improper (which, of course, they are not bound to do), they may proceed in the proper way to make the executors accountable for the value of the assets used in carrying on the business, and they may also follow the assets and obtain a charge

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on the business in the hands of the executors for the value of the assets misapplied, with interest thereon; and they may enforce the charge, if necessary, by means of a receiver and a sale. Then there can be no room for any claim to indemnity on the part of the executors. The charge in favour of the trust estate must be satisfied first. The executors can only take what is left. But the creditors must do one thing or the other. Though they are not bound by what they do in ignorance, and may, by leave of the Court, sue in respect of wilful default after having taken the usual order, they cannot approbate and reprobate in one breath. They cannot claim the assets of the business as a going concern in the state and condition in which those assets happen to be at the moment when they choose to intervene, and at the same time refuse the executors indemnity in respect of liabilities incurred in carrying on the business.

It is, I think, important to place this matter on its true footing. Otherwise there may be great confusion in the administration of estates. This appeal is an illustration of the expense and delay which may be occasioned in a simple case by the disregard of elementary principles. Whether the testator's businesses were or were not continued properly—whether there has or has not been a dealing with the assets of which the creditors might have complained—the order which the appellants seek to restore is I think one which cannot stand. The appeal therefore, in my opinion, must fail.

I ought perhaps to stop here, but having regard to the course which the case has taken and out of deference to the arguments addressed to this House, I will take the liberty of considering whether a case of wilful default or breach of trust could have been established if the issue had been properly raised and an appropriate decree had been asked for.

It was a just observation on behalf of the appellants that an executor may be liable to creditors for conduct which no beneficiary could question, for beneficiaries are bound by the terms of the will, while creditors are not. But still in the administration of assets, as regards creditors as well as regards beneficiaries, executors are in the position of trustees, and it cannot be doubted that if a cestui que trust not under disability sanctions a departure

from the strict line of duty prescribed by the conditions of the trust, he cannot afterwards be heard to complain of that departure, or treat it as a breach of trust.

Now the evidence as to what passed between the executors and the appellants after the testator's death is meagre in the extreme. In fact we are told nothing more than what I have already stated. But in order to appreciate the effect of the evidence, such as it is, one must bear in mind the peculiar position of the appellants and the circumstances of the Anvil Street business, which was the more important business of the two, and the real difficulty in the administration of the estate. In that business the appellants were, in fact, part proprietors. The machinery belonged to them. They were masters of the situation under the agreement of September 1874. At the time of the testator's death the business had been carried on for nine years under their supervision, or the supervision of inspectors acting on their behalf, and they had, of course, the fullest opportunity of judging of its present state and of its future prospects. In each of the three last years default had been made in paying the stipulated instalments of purchase-money. It must be presumed that the appellants allowed the business to go on during the testator's life notwithstanding these defaults, because they judged it expedient in the interests of their own cestui que trusts. On the testator's death, knowing as much about the Anvil Street business as the executors did, and having been fully informed of the position of the estate, they must have seen that the chance of obtaining payment in full depended upon the Anvil Street business being carried on successfully for some years to come. Under these circumstances they assent to the continuance of the business, and allow the executors to use their property for the purpose of carrying it on, retaining of course the right to intervene at any moment. I cannot doubt that the proper conclusion is that the testator's businesses were carried on by the executors under the power contained in the will, with the sanction of the appellants, for the benefit of the estate, and in the interest of the creditors as well as in the interest of the beneficiaries.

In this view of the case the absence of any charge of wilful

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default or breach of trust to which I have already adverted is not without significance. I may add that I rather doubt whether it would have been for the advantage of the appellants to have fixed the executors with wilful default. What would have been the result? The appellants no doubt might have charged the executors with the value of the book debts and of the stock-in-trade at the time of the testator's death. But those book debts have been got in: the stock-in-trade existing at the testator's death has been realised, and realised to the best advantage. So far as the proceeds of these assets have been distributed in paying the testator's creditors, the executors are discharged, and the appellants cannot complain, though they did not participate in the distribution. The executors could not have been charged with anything in respect of the goodwill of the Anvil Street business, for it was not theirs to sell so long as the agreement of 1874 was in force. The Middleton business seems to have been in as good a position at the time of the institution of these proceedings as it was at the time of the testator's death. During the interval it appears to have been carried on at a considerable profit: the benefit of that profit the appellants get by treating the business as properly continued, while the executors admittedly must be charged with the sums paid to the testator's widow, which were borne by the Middleton business.

It was suggested by the learned counsel for the appellants that the executors carried on the testator's business solely in the interest of their beneficiaries, and that the appellants themselves remained passive or quiescent from motives of indulgence and kindly feeling towards the testator's family, relying upon the representations of the executors that the estate was solvent. I may observe in passing that this is a singular attitude to attribute to persons in the position of the appellants, who would themselves be liable for a breach of trust if they neglected to get in a debt due to their testator, however charitable or laudable their motives may have been. I cannot help thinking that they would be the first to disclaim a generosity so cheap and so perilous. I am glad to find that there is nothing in the evidence to shew that the appellants neglected their obvious duty.

Then it was said that the executors had admitted assets. No

doubt they thought that the estate would work out all right, and no doubt there are circumstances which, taken by themselves, would amount to an admission of assets. But it seems to me that when the case is fairly considered, all these circumstances go for very little. Much was made of a balance-sheet which is stated by one of the solicitors for the appellants to have been received from the solicitor for the executors, and then to have been submitted by him to one of the appellants in March, 1884, though oddly enough that gentleman says nothing about it himself. From that balance-sheet it appears that the liabilities were nearly £19,000 while the assets were under £10,000, exclusive of the Middleton property and "the Anvil Street Works." A credit balance was brought out by setting against these two items figures in pencil, which appear on the face of the balance-sheet to be in the one case the price paid for the property, and in the other £11,000 the aggregate of the sums already paid on account of the purchase-money of the Anvil Street business. How this balance-sheet could possibly have misled any man of business, I am at a loss to conceive. It shews an estate of very doubtful solvency requiring skilful management if not careful nursing. To do the appellants justice, they do not allege that there was any misrepresentation or that anything was kept back from them, nor do they suggest that they relied on any representations made by the executors; and as for this particular balance-sheet they do not even allude to it. I do not think that the executors could have been charged as on an admission of assets. But I confess I fail to see the relevancy of the point, though it was much pressed. The administration order proceeds on the footing of assets not being admitted, and I am unable to understand the connection between the fact that the executors were unduly sanguine and the proposal to confiscate their expenditure for the benefit of the creditors.

One word as to the extent of the executors' indemnity. The order under appeal limits it to that part or the testator's estate which is described in the order as having been "acquired by the executors since the death of the testator." I am not aware of any authority for splitting the assets in that way. If a testator's business is carried on after his death, in accordance with the

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provisions of the will, which, I think, is the true view in this case, the indemnity of the executors is only limited by the amount of the assets which the testator has authorized the executors to employ in the business. If the business is carried on by the executors at the instance of the creditors without regard to the terms of the will, the executors, I suppose, have the ordinary rights of agents against their principals. But I can see no reason in any case for limiting the indemnity to that portion of the assets which may have come into existence or changed its form since the testator's death. An unsecured creditor has no right against any specific part of the assets. He can have no greater right in respect of one part of the assets than another. It is all one estate. His right is to see that the executors get in the estate and apply it in due course in payment of debts, and he may sue in equity, as the appellants have done, to enforce that right. It appears to me, therefore, that the Order of the Court of Appeal should be varied by omitting the words which limit the indemnity of the executors and the inquiry consequential on that limitation. The inquiry would be productive of needless expense, though the practical effect of the limitation in the present case may be immaterial.

As regards costs it appears that both in the Vice-Chancellor's Court and in the Court of Appeal the costs of all parties as between solicitor and client were directed to be taxed and paid out of the estate. I cannot help observing that the rule which prevails in the Chancery Division of postponing the question of costs until further consideration in cases where further consideration is reserved is for obvious reasons to be preferred to the course adopted in the present case in the Vice-Chancellor's Court, especially where there is a possibility of the executors being found debtors to the estate. Passing from this point, which I only notice incidentally, I presume your Lordships under the circumstances would not be disposed to interfere with the existing order as to costs though you may consider the application which has led to this unfortunate litigation to have been misconceived. But I agree that there is no reason for relieving the appellants from the payment of the costs of the appeal. The executors will have the difference, if any, between their costs taxed as

between party and party, and taxed as between solicitor and client out of the estate.

LORD HANNEN:—

My Lords, I have had the advantage of reading the opinions which have just been delivered by my noble and learned friends who have preceded me, and I concur in the opinion that the judgment of the Court of Appeal with the modifications suggested should be affirmed.

Order of the Court of Appeal varied by leaving out the words "of such part of the estate as has been acquired by the executors since his death," and by omitting the consequential inquiry, No. 13. With these variations Order of the Court below affirmed and appeal dismissed. The appellants to pay the costs of this appeal; the respondent executors to be entitled to the difference, if any, between the costs taxed as between party and party and the costs taxed as between solicitor and client out of the estate; cause remitted to the Chancery of the County Palatine of Lancaster.

Lords' Journals 12th May 1891.

Solicitors for appellants: *Rowcliffe, Rawle & Co., for W. L. Welsh & Sons, Manchester.*

Solicitors for the executors respondents: *Rowley, Page, & Rowley.*

Solicitors for the other respondents: *Horne & Birkett, for Thomas Chorlton, Manchester.*

[HOUSE OF LORDS.]

H. L. (E.) 1891 May 5.

LANE AND ANOTHER . . . . . APPELLANTS;

AND

ESDAILE AND ANOTHER . . . . . RESPONDENTS.

Practice—Extension of Time to Appeal—Judicature Act 1876 (39 & 40 *Vict. c.* 59) *s.* 3—*Order* LVIII. *r.* 15.

No appeal lies to this House from a refusal of the Court of Appeal to grant special leave to appeal from a judgment of the High Court in a case where the time limited (by Order LVIII. rule 15) for appealing has expired. Such a refusal is not an order or judgment of the Court of Appeal within the meaning of s. 3 of the Appellate Jurisdiction Act 1876.

APPEAL against a decision of the Court of Appeal (1).

In July 1885 Kay J. gave judgment for the plaintiffs in an action against several defendants, two of whom were the present appellants. Some of the defendants (not including the present appellants) appealed to the Court of Appeal, and being unsuccessful in that Court appealed again to this House, where on the 10th of August 1888 they succeeded in reversing the judgments below against them (2). In December 1888 the present appellants applied to the Court of Appeal for special leave to appeal against the judgment of July 1885. This application was eventually (on the 23rd of January 1889) refused by the Court of Appeal (Cotton, Lindley, and Lopes L.JJ.), the Court making no order (1). The present appeal was against that refusal.

May 4. Sir *H. James* Q.C. (*Ashton Cross* and *Frederick Low* with him) for the appellants dealt first with the preliminary objection that no appeal lay to this House from such a refusal, and contended that under the Appellate Jurisdiction Act 1876 an appeal to this House lay under the words "an appeal shall lie to the House of Lords from any order or judgment of" the Court

(1) 40 Ch. D. 520. (2) 13 App. Cas. 613.

of Appeal, the refusal of the Court of Appeal being an "order or judgment;" and that nothing in Order LVIII. rule 15 (1) did or could affect the right of appeal given by the Act. They contended that the cases of *The Amstel* (2); and *Kay* v. *Briggs* (3) were distinguishable.

Byrne Q.C. and *H. B. Howard* for the respondents contended that no appeal lay.

LORD HALSBURY L.C.:—

My Lords, I am of opinion that this preliminary objection ought to prevail. An appeal is not to be presumed but must be given. I do not mean to say that it must be given by express words, but it must be given in some form or other in which it can be said that it is affirmatively given and not presumed. In the particular case now before your Lordships the appeal is certainly not given in express words. The words used are "leave of the Court"; and although it may be that in some sense the leave of the Court, whether it is given or withheld, becomes an order (that I will not stay to discuss), that is not the ordinary mode in which it would be described. It is to be something that is done by the order of the Court. I confess myself I should hesitate if it was only to turn upon the question of language, because although a thing might be called an order, or might be called a judgment, or might be called a rule, or might be called a decree, it might well be that nevertheless by reason of the context it would come within the obvious meaning and purpose of the statute; so that although it was no one of those things in name it might be one of those things in substance, and therefore would come within the general provision that an appeal should lie.

But when I look not only at the language used, but at the

(1) By Order LVIII. r. 15, "No appeal to the Court of Appeal from any interlocutory order, . . . shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. . . ."

(2) 2 P. D. 186.

(3) 22 Q. B. D. 343.

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substance and meaning of the provision, it seems to me that to give an appeal in this case would defeat the whole object and purview of the order or rule itself, because it is obvious that what was there intended by the Legislature was that there should be in some form or other a power to stop an appeal—that there should not be an appeal unless some particular body pointed out by the statute (I will see in a moment what that body is), should permit that an appeal should be given. Now just let us consider what that means, that an appeal shall not be given unless some particular body consents to its being given. Surely if that is intended as a check to unnecessary or frivolous appeals it becomes absolutely illusory if you can appeal from that decision or leave, or whatever it is to be called itself. How could any Court of Review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a fit case for an appeal? And if the intermediate Court could enter and must enter into that question, then the Court which is the ultimate Court of Appeal must do so also. The result of that would be that in construing this order, which as I have said is obviously intended to prevent frivolous and unnecessary appeals, you might in truth have two appeals in every case in which, following the ordinary course of things, there would be only one; because if there is a power to appeal when the order has been refused, it would seem to follow as a necessary consequence that you must have a right to appeal when leave has been granted, the result of which is that the person against whom the leave has been granted might appeal from that, and inasmuch as this is no stay of proceeding the Court of Appeal might be entertaining an appeal upon the very same question when this House was entertaining the question whether the Court of Appeal ought ever to have granted the appeal. My Lords, it seems to me that that would reduce the provision to such an absurdity that even if the language were more clear than is contended on the other side one really ought to give it a reasonable construction.

My Lords, I confess that when I look both at the subject-matter with which the order deals and at the language of the order itself it seems to me obvious that it was intended that the

decision should be final (whether that is said in terms or not seems to me to be immaterial), unless the Court of Appeal, the body there prescribed, in the exercise of that jurisdiction should give leave to appeal. As no leave has been given in this case, and as no appeal can be brought unless leave has been given, I am of opinion that this preliminary objection ought to prevail, and that this appeal should be dismissed, and I so move your Lordships.

LORD BRAMWELL :—

My Lords, I have had a difficulty of the kind which I will describe. When the first Judicature Act passed it took away the jurisdiction of this House, and therefore under that Act there could be no appeal from any order made by the Court of Appeal. It cannot be said therefore that when that Act passed it was the intention of the Legislature that such an appeal as this should not take place, because in truth it was impossible that it could, there was no appellate tribunal from the Court of Appeal. Then, when the next Act passed which restored the jurisdiction of this House, it enacted that every order and judgment (I am not thinking of the particular words at this moment) made by the Court of Appeal should be appealable to this House. Well, if the refusal of the Court of Appeal to permit the appeal was an order by them that order would come within the very terms of the Act of 1876 which restored the jurisdiction of this House. Then it might be argued, here you have a case within the very words of the Statute of 1876, that is to say an order. But all my noble and learned friends, I know, think that this is not such an order—that if you think fit to call it an order, if the right name to give it is "an order," at all events it is not such an order as it was intended by the Statute of 1876 should be appealable. I think no reasonable man could set up his own particular doubt in opposition to the opinions of five persons who are so much entitled to his respect as my noble and learned friends are ; and therefore I concur, I am content to concur, that this refusal of the Court of Appeal to permit an appeal, if an order at all, was not an appealable order under the Statute of 1876.

H. L. (E.) 1891 LANE v. ESDAILE.

LORD HERSCHELL :—

My Lords, I concur in thinking that this appeal cannot be entertained. It cannot be doubted that the object of the 15th rule of the 58th Order was to make the judgments, after the lapse of a year, practically final. It is clear that some time must be fixed at which the right of appeal should cease, otherwise parties would never know what their rights were, and there would be no possibility of people being safe in dealing with the fruits of a judgment because the judgment might be still subject to appeal. But then it was thought that there might be special circumstances in which the Court of Appeal might relax that rule and consider that, notwithstanding it, an appeal should be permitted. I think that the matter was intrusted, and intended to be intrusted, to their discretion ; and that the exercise of a discretion of that sort intrusted to them is not, within the true meaning of the Appellate Jurisdiction Act, an order or judgment from which there can be an appeal. My noble and learned friend on the Woolsack has pointed out the inconveniences which would arise from a contrary decision; and I am certainly fortified in that conclusion by the view which was taken by the Court of Appeal with reference to a very similar provision. In sect. 45 of the Judicature Act 1873 (36 & 37 Vict. c. 66), which provides for appeals to a Divisional Court from an inferior Court, it is provided that "the determination of such appeals respectively by such Divisional Courts shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard." In that case the discretion is intrusted to the Divisional Court. In the case of *Kay* v. *Briggs* (1) the Divisional Court had refused leave to appeal. Thereupon it was attempted in the Court of Appeal to review their determination in that respect. The Court of Appeal took the view that they were unable to entertain the question and could not review the decision of the Divisional Court; and the Master of the Rolls uses language which appears to me to be quite appropriate to the present question. He says: "If this Court could overrule the discretion given by that section to

(1) 22 Q. B. D. 343.

Divisional Courts the practical effect would be to allow an appeal here in every case, because the facts of each case would be brought before us in order to enable us to decide whether or not we ought to overrule that discretion. I think that the real meaning of sect. 45 is to confine the power to give leave to appeal absolutely to the Divisional Courts." Now if you substitute for "the Divisional Courts" "the Court of Appeal," every word of that is strictly applicable to the present case; and indeed if the contention of the appellants were well founded I think it would follow that under this sect. 45 there could be an appeal to the Court of Appeal from a refusal by the Divisional Court, and an appeal again from the Court of Appeal to this House; so that every County Court case might be brought up to this House upon the question whether an appeal should be allowed or not.

My Lords, I am quite aware that Sir Henry James on behalf of the appellants attempted to distinguish the two cases by reason of a difference of language. In the present case it is said that no appeal shall lie after a year except by special leave, whilst in the other case it is said that the determination of the appeal shall be final unless special leave to appeal be given. I do not think there is any difference in the meaning of those two expressions. What interpretation are you to put upon the expression "shall be final"? None but this in that context, that the determination of the appeal by the Divisional Court shall not be made a subject of appeal unless special leave be given. What difference is there between that and saying that no appeal shall lie unless special leave be given? My Lords, I think that there is no substantial difference between the two, and that if we were to accede to the argument for the appellants we should be bound to overrule the case of *Kay* v. *Briggs* (1) and to pronounce a decision which would be as prejudicial in the case of all County Court appeals as to permit the appeal would be in this case.

LORD MACNAGHTEN:—

My Lords, I concur. I think that according to the true construction of the Judicature Act and Orders, the Court of Appeal

(1) 22 Q. B. D. 343.

H. L. (E.) 1891 LANE v. ESDAILE.

are constituted the sole and final judges of the question whether an appeal to them should or should not be admitted when the proposed appellant has allowed the prescribed period to elapse, and therefore that there can be no appeal from the grant or refusal of that indulgence.

LORD FIELD:—

My Lords, I am also of opinion that this petition of appeal should be dismissed. It seems to me that the rules have given to the litigant ample time for the purpose of deciding whether he shall appeal or not; in the case of an interlocutory order twenty-one days is the limit, in the case of a final judgment a year. It seems to me that the policy of the Legislature was that after that time, when the litigant had lost his position by reason of his not appealing within the time limited for that purpose, he might be restored to that position, but that in carrying out that policy the Legislature intended that the matter should not go beyond the Court of Appeal, and therefore they have used the words that leave is to be given—that is the leave of the Court of Appeal. It seems to me that if your Lordships were to say now "We will give leave" and the Court of Appeal must enforce that, it would be imposing upon them the duty of giving a leave, as their leave, which they in their own judgment, think ought not to be given.

LORD HANNEN:—

My Lords, I concur, and I have nothing to add to the reasons which have been given by the noble and learned Lords who have preceded me.

Appeal dismissed as incompetent, with costs.

Lords' Journals 5th May 1891.

Solicitor for appellants: *J. E. Turner.*
Solicitors for respondents: *Winter & Co.*

[HOUSE OF LORDS.]

THOMAS MONTGOMERY . . . . . APPELLANT;

AND

THOMPSON AND OTHERS . . . . . RESPONDENTS.

H. L. (E.) 1891 May 12.

Trade-mark—Injunction—Fraudulent Use of Names—Imitation—Intention to deceive the Public—"Stone Ale."

The perpetual injunction granted by the Court of Appeal (41 Ch. D. 35) affirmed.

APPEAL from an order of the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ. (1)), affirming an interlocutory order of Chitty, J., and granting a perpetual injunction against the defendant.

The following account of the facts is taken from the judgment of Lord Watson :—

The appellant, defendant in this action, is a licensed victualler, and the proprietor of several hotels and public-houses in Liverpool. He has recently erected a brewery at Stone, which is a town in the county of Stafford, containing from 6000 to 7000 inhabitants. Down to that time there had only been one brewery in Stone, which belongs to the plaintiffs (respondents in this appeal), and has been carried on by them and their predecessors continuously since the year 1780, under the firm-name of "John Joule & Sons."

It is not disputed that the ales brewed and sold by the plaintiffs' firm have acquired considerable reputation, and have for many years past been known to the wholesale and retail trades, as well as their customers, by the distinctive appellation of "Stone Ales" and "Stone Ale," the latter term being exclusively applied to a particular and superior quality of liquor. A trader who buys ale under one or other of these designations relies upon its having been manufactured by the plaintiffs; and even those consumers who do not know the manufacturer, or the place of

(1) 41 Ch. D. 35.

H. L. (E.) 1891 MONTGOMERY v. THOMPSON.

manufacture, expect to get the same ale which they have been in use to purchase, namely the plaintiffs'.

The Lords Justices of Appeal were satisfied that the defendant was using these designations in connection with ales of his own manufacture, with the intention of representing that he was selling the plaintiffs' ales; and they accordingly affirmed the order of Chitty, J., and granted a perpetual injunction restraining the defendant from "carrying on the business of a brewer at Stone, under the title 'Stone Brewery,' or 'Montgomery's Stone Brewery,' or under any other title so as to represent that the defendant's brewery is the brewery of the plaintiffs, and from selling or causing to be sold any ale or beer not of the plaintiffs' manufacture, under the term 'Stone Ales,' or 'Stone Ale,' or in any way so as to induce the belief that such ale or beer is of the plaintiffs' manufacture, and from infringing the plaintiffs' registered trade-marks, or any of them."

The defendant does not resist an injunction; and he takes no exception to the order of the Appeal Court, in so far as it relates to the title of his brewery, or to the plaintiffs' trade-mark. But he objects to that part of it which prohibits him from selling ale or beer other than the plaintiffs', under the terms "Stone Ales" or "Stone Ale," which are not registered trade-marks. He maintains that the prohibition as it stands is too stringent; that he has a legal right to use one or other or both of these terms in describing ale or beer brewed by him at Stone, so long as he uses them in combination with other words which sufficiently distinguish his manufacture from that of the plaintiffs'; and that the injunction as framed deprives him of that right.

The arguments appear from the judgments; for the present report it is enough to say as follows:—

1891. March 12, 13. Sir *H. Davey*, Q.C., and *Byrne*, Q.C. (*V. Somers Browne* with them), for the appellant, treated the question as one of law, and cited the cases usually referred to in the Chancery Division and (inter alia) *Seixo* v. *Provezende* (1); *M'Andrew* v. *Bassett* (2); *Turton* v. *Turton* (3).

(1) Law Rep. 1 Ch. 192. (2) 4 D. J. & S. 380.
(3) 42 Ch. D. 128.

Sir *R. Webster*, A.-G., and *Rigby*, Q.C. (*J. F. Waggett* with them):—

The question is one of fact: have the terms "Stone Ales" and "Stone Ale" acquired a secondary meaning, and has the conduct of the appellant been simply a contrivance to use those terms so as to deceive the public? If so (and the evidence is irresistible) the injunction does no more than protect the plaintiffs' rights. See what Lord Westbury said in *Wotherspoon* v. *Currie* (1).

The HOUSE heard a reply on behalf of the appellant, and took time for consideration.

1891. May 12. LORD HERSCHELL:—

My Lords, the respondents have carried on business as brewers at Stone, in the county of Stafford, a town of 6000 or 7000 inhabitants, for upwards of a century. There have been, practically speaking, no other breweries carried on there. The ales manufactured by the respondents have gained a high reputation, and although in advertising them the name of Joule & Co., under which the brewing business was carried on, has generally been associated with the words "Stone Ale," yet it is, I think, beyond dispute that the respondents' ales have become known to the market, and to the public, under the terms "Stone Ales" or "Stone Ale," the latter being exclusively applied to a particular quality of beer, and any one asking for "Stone Ale," or "Stone Ales," would desire to be supplied, and expect to be supplied with the ale manufactured by the respondents.

The appellant, who is a licensed victualler, owning public-houses in Liverpool, has recently established a brewery at Stone. The Courts below came to the conclusion that he intended to use the terms "Stone Ale" and "Stone Ales" in connection with liquor of his own manufacture, with a view of leading to the belief that the ales he sold were those which, as I have said, had become known to the market and the public, and thus obtaining advantage of the reputation which the respondents' ales had acquired. An injunction was accordingly granted on the application of the respondents, restraining the appellant from

(1) Law Rep. 5 H. L. 521.

H. L. (E.) 1891 MONTGOMERY v. THOMPSON. Lord Herschell.

"carrying on the business of a brewer at Stone under the title 'Stone Brewery' or 'Montgomery's Stone Brewery,' or under any other title so as to represent that the defendant's brewery is the brewery of the plaintiffs, and from selling or causing to be sold any ale or beer not of the plaintiffs' manufacture under the term 'Stone Ales' or 'Stone Ale,' or in any way so as to induce the belief that such ale or beer is of the plaintiffs' manufacture, and from infringing the plaintiffs' registered trade-marks, or any of them.

It was not contended at your Lordships' bar by the learned counsel for the appellant that no injunction ought to have been issued, nor did they take exception to the terms of the injunction, save in one respect. They insisted that the appellant ought not to have been restrained from "selling or causing to be sold any ale or beer not of the plaintiffs' manufacture under the term 'Stone Ales' or 'Stone Ale.'" They contended that such an injunction was too wide in its language; that the plaintiffs had no property in the word "Stone," as applied to ale, and that they could not monopolise the use of the name of that town merely because for a time they had been the only brewers there, and exclude the rest of the public from employing it to describe the place of origin of such beer as they might choose to brew there. I do not think the principle on which the Court ought to act in such a case as the present is open to doubt. The respondents are entitled to ask that a rival manufacturer shall be prevented from selling his ale under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so, because the practical effect of such restraint may be much the same as if the persons seeking the injunction had a right of property in a particular name.

It appears to me idle to argue in opposition to the injunction that it is against the public interest to permit a monopoly of the use of the name of a town for trade purposes, when the only effect of allowing its use by the person and for the purpose sought to be restrained would be to deceive the public. The injunction might, no doubt, have been framed in more general terms, and thus have been free from the objection raised, but had it been so, the same question as has been discussed at the bar would have arisen

on an application to commit the defendant for breach of the injunction in respect of his selling his ale as "Stone Ale"; and the Court having come to the conclusion that he could not sell the liquor manufactured by him under that name without inducing the belief in the mind of the purchaser that he was obtaining the plaintiffs' ale, a conclusion from which I see no ground for differing, I do not think that it was improper to frame the injunction in the form adopted, and thus to determine the question at once, instead of leaving it to be raised and contested on an application to commit. I think the fears expressed in argument, that even if the appellant did not use and were no party to using the prohibited designation in connection with the sale of his ales he might nevertheless be held to have committed a breach of the injunction, are chimerical. I do not think that any principles are involved in the present case beyond those which are well recognised and beyond dispute. The form of the injunction which is suitable and legitimate in any particular case must depend upon all its circumstances.

I see no reason to think that the Court below has erred in making the order appealed from, and I therefore move your Lordships that it be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, the precise terms in which an injunction ought to run must depend upon the particular facts of the case. In the present case I feel somewhat hampered by the consideration that the only appeal is at the instance of the defendant, and the injunction cannot be re-cast in any way to his disadvantage. Had the matter been open I should have preferred an order restraining the defendant "from using the word 'Stone' as descriptive of or in connection with ale or beer manufactured by him, or ale or beer (not being of the plaintiffs' manufacture) sold or offered for sale by him, without clearly distinguishing such ale or beer from the ale or beer of the plaintiffs." That was substantially the form adopted by Lord Hatherley (then Vice-Chancellor) in *Seixo* v. *Provezende* (1), which was confirmed on appeal

(1) Law Rep. 1 Ch. 192.

H. L. (E.) 1891 MONTGOMERY v. THOMPSON. Lord Watson.

by the Lord Chancellor (Cranworth), and it was followed, after consideration, by this House, in *Johnston* v. *Orr Ewing* (1). But it appears to me that an injunction in these or similar terms would involve a prohibition against selling ale or beer other than the plaintiffs' under the terms "Stone Ales," or "Stone Ale," and might in other respects be more stringent than the order as settled by the Lords Justices.

In these circumstances I have come to the conclusion that the best course to follow in this case is to affirm the order of the Court of Appeal. I am of opinion that any attempt by the defendant to sell ale or beer of his own brewing as "Stone Ales" or as "Stone Ale" would constitute an infringement of the plaintiffs' right. Whether it is possible for the defendant to use the word "Stone" with such differentiæ as will distinguish his manufacture from what has hitherto been known as "Stone Ales" and "Stone Ale," and to keep outside the obvious and natural scope of the injunction, is a matter for his own consideration.

I therefore concur in the judgment which has been moved by the noble and learned Lord on the Woolsack.

LORD MACNAGHTEN:—

My Lords, the appellant complains of the injunction awarded against him, so far and so far only as it prohibits him absolutely "from selling or causing to be sold any ale or beer not of the plaintiffs' manufacture, under the term 'Stone Ales' or 'Stone Ale.'" The order was made in the first instance on an interlocutory application. Then there was an appeal. The Court of Appeal affirmed the order and maintained the injunction as it stood. After judgment was delivered the appellant's counsel offered to submit to "a perpetual injunction in that form." "You had better accept that, Mr. Romer," said Cotton, L.J. The offer was accepted, and the injunction was made perpetual. But the order is not expressed to be by consent.

Stone, it seems, is a town in Staffordshire, containing some 6000 inhabitants. It has a supply of water admirably suited for brewing. So the appellant says, and his opinion is fortified by scientific analysis. Anyhow Stone is famous for its ales,

(1) 7 App. Cas. 219.

which are known in that part of England as "Stone Ales," while one special quality is known as "Stone Ale." These ales all come from the plaintiffs' brewery, which is said to have been established in Stone for a hundred years, and to have flourished there all that time without a rival, and even without any attempt at rivalry worth mentioning. Whatever reputation, therefore, is attached to Stone Ales, or to Stone Ale, above other ales known in the district, is due to the plaintiffs and their predecessors in business. The value of that reputation, whatever it is, no one knows better than the appellant. He is the proprietor of several hotels and public houses in Liverpool, and in his different establishments he has dealt largely in Stone Ales procured from the plaintiffs. In 1887 he determined to set up as a brewer himself. He had to find a site for his business. Where was he to go? After much consideration, influenced, as he says, by the peculiar virtue of the water, he resolved to go to Stone. One thing leads to another. Having gone to Stone he could think of no better name for his brewery than "Stone Brewery"; he could find no more fitting designation for his ales than "Stone Ales." Then came these proceedings. It is not the first time in these cases that water has got an honest man into trouble, and then failed him at a pinch. Neither Chitty, J., nor the learned Lords Justices could be persuaded that the appellant was attracted to Stone by the peculiar virtue and chemical properties of the water. They thought he went there simply with the object of stealing the plaintiffs' trade, and in the hope of reaping where he had not sown. They were satisfied that he meant to make a fraudulent use of the term "Stone Ales," and that he could not possibly use that term honestly.

With the judgment that has been passed upon his character and conduct the appellant does not quarrel. Protesting that it was somewhat harsh, his counsel used it to point their argument. Granted, they said, that the appellant is a fraudulent man—as fraudulent as you please—still his demerits cannot enlarge the plaintiffs' rights. The injunction being absolute and unqualified in its terms will secure to the plaintiffs the monopoly of brewing in Stone. With such water Stone might be as Wrexham or even as Burton. The injunction makes it the private preserve of the

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plaintiffs. Then, they argued, the appellant is not to be deprived of his rights because he has behaved badly. All the Court ought to do is to keep him strictly within his rights. He had a perfect right, as everybody has, to set up a brewery in Stone. Ale brewed in Stone is Stone Ale, for all that the Court can say or do. The appellant is entitled to call his ale what it really is, and to sell it under its true name, if he takes care that his customers are not induced to believe that it is of the plaintiffs' manufacture.

My Lords, I confess I feel the force of these arguments, and I should be disposed to give some effect to them if it were not for the peculiar circumstances of the case. The order, it will be remembered, was made first on an interlocutory application. The appellant had announced his intention of selling his ales as "Stone Ales." The Court held that that would be a fraud, and that nothing could justify it; so the Court interfered to prevent the particular fraud which the appellant was at the time threatening to commit. I apprehend that under the circumstances the interlocutory order was right. Is the order right now that it has been made perpetual?

My Lords, there are two considerations which lead me to think it ought not to be disturbed. In the first place, I cannot forget the way in which the order came to be made perpetual. Though the order was certainly not a consent order, it was made on the invitation of the appellant. It may be that if it had not been for that invitation—if the action had followed its regular course—the injunction would have been in a different form. Under these circumstances I apprehend that your Lordships would be slow to alter it to the disadvantage of the plaintiffs. In the next place I do not see my way to alter it at all, except by making it more stringent and more severe. And that would hardly be fair to the appellant on his appeal.

I think that an order in the terms read by my noble and learned friend opposite (Lord Watson), an injunction in the form of that granted in *Seixo* v. *Provezende* (1) would have better met the justice of the case. In some respects *Seixo* v. *Provezende* (1) was very like the present case. In a district in the Alto Douro

(1) Law Rep. 1 Ch. 192.

called Seixo, the plaintiff had a vineyard known as the "Quinta do Seixo," and his wines came to be known on the London market as "Seixo" wines. The defendant also had a vineyard in the Seixo district, and he put his wines on the London market with brands which led to their being called by a name of which Seixo formed part. The defendant's conduct was not free from suspicion, and in one case at least there was some confusion between the wines. The same arguments were used there as have been used here. The plaintiff, it was urged, had no right to the monopoly of the term "Seixo." The defendant had as much right to use it as the plaintiff, if he used it honestly. The Vice-Chancellor said he had a right to use the term "Seixo," but that if he chose to use it, it lay upon him to distinguish his wines from those of the plaintiff, and to make the distinction perfectly clear, and so the injunction which, if I remember right, was dictated by the Vice-Chancellor himself, went in that form. The form was approved on appeal, and it has been sanctioned in this House.

It is obvious, I think, that if the injunction had been in that form, the appellant could not have used the term "Stone Ales" at all. It would have been impossible for him to have called his ales "Stone Ales," and to have distinguished his ales from those of the plaintiff. Any attempt to distinguish the two, even if honestly meant, would have been perfectly idle. Thirsty folk want beer, not explanations. If the public get the thing they want, or something near it, and get it under the old name—the name with which they are familiar—they are likely to be supremely indifferent to the character and conduct of the brewer, and the equitable rights of rival traders.

For these reasons, though I think the form of the injunction is open to objection, I agree that the appeal must be dismissed.

LORD MORRIS :—

My Lords, that an injunction should issue is clear, and, indeed, it has not been resisted on the part of the appellant. That the appellant's conduct was fraudulent in a high degree is equally clear; that the injunction should restrain the use of words to pass off the appellant's goods as the respondents' is equally clear;

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but I entertain great doubt whether the injunction granted does not go beyond what the respondents are entitled to—by restraining under any circumstances, whether misleading or not, the use of the words "Stone Ale" or "Stone Ales."

The respondents have not now the trade-mark "Stone Ales," and I cannot see how they can have acquired the right to the exclusive use of the words "Stone Ale" against the world, and thus appropriate the name of a large town and of the commonest of drinks. It appears to me that every person has a right to the honest use of the words "Stone Ale"; otherwise the respondents would derive the advantage of a trade-mark, though not entitled to it. When the respondents are safeguarded against any deception of their goods, they appear to me to be entitled to no more. I, therefore, doubt whether the appellant should be debarred from the use of the words "Stone Ale" in any collocation or combination with other words. If he used the words in a fraudulent combination, so as to confound his goods with the respondents', and thus palm them off on the public, that would be met without the deprivation of the right to use the words at all. If circumstances give a good name to ales brewed at Stone, other brewers ought not to be deprived of the right so to describe them, taking care to distinguish them from the respondents'.

I should, therefore, have desired that the injunction was not so wide and stringent as it is; but I am not prepared, under the circumstances of this case, to dissent from the judgment moved.

LORD HANNEN:—

My Lords, the respondents (plaintiffs below), using the trade-name of John Joule & Sons, are brewers at Stone, in Staffordshire. They and their predecessors have carried on their business at that place for 100 years, and for many years past their brewery (the only one at Stone) has been called and known as "Stone Brewery," and the ales brewed there have been called and known as "Stone Ales," and one particular ale has been called and known as "Stone Ale."

The defendant Montgomery is a publican at Liverpool, and has sold for some years, at his place of business there, the plaintiffs' ales as "Stone Ale" and "Stone Ales." He has recently

established at Stone a brewery, which he proposed to call "Stone Brewery," and to sell ale there as "Stone Ale." He has, however, offered to submit to a perpetual injunction against the use of the words "Stone Brewery" or the use of the words "Stone Ale" or "Stone Ales," in such a manner as to induce the belief that the defendant's ale was ale of the plaintiffs' manufacture.

The plaintiffs, however, claim that the defendant shall be absolutely restrained from using the words "Stone Brewery" or "Stone Ale" or "Stone Ales." Chitty, J., has granted an injunction restraining the defendant from "carrying on the business of a brewer at Stone under the title 'Stone Brewery' or 'Montgomery's Stone Brewery,' or under any other title so as to represent that the defendant's brewery is the brewery of the plaintiffs, and from selling, or causing to be sold, any ale or beer not of the plaintiffs' manufacture under the term 'Stone Ales' or 'Stone Ale,' or in any way so as to induce the belief that such ale or beer is of the plaintiffs' manufacture, and from infringing the plaintiffs' registered trade-marks or any of them."

This judgment of Chitty, J., has been confirmed by the Court of Appeal.

The appeal to this House is based on the contention that the word "Stone" in connection with ale or beer is merely used by the appellant in a geographical sense, as indicating that the ale or beer is manufactured at that place, and that any one is entitled to use it in that sense, provided he does not use it so as to induce the belief that his goods are the goods of manufacturers previously established at Stone.

The principle contended for by the appellant may be admitted as correct, but in considering what may induce purchasers to believe that the appellant's goods are the goods of the respondents, all the circumstances of the case must be taken into account. Here the evidence has satisfied Chitty, J., and the Court of Appeal, and I think ought to satisfy your Lordships that the respondents' goods had acquired by long usage the name of "Stone Ale" and "Stone Ales," that that name does not merely convey the idea that the beer was manufactured at Stone, but that it was ale of the respondents' manufacture. The appellant is, undoubtedly, entitled to brew ale at Stone, and to

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indicate that it was manufactured there, but there are various means of stating that fact without using the name which has now become the designation of the respondents' ale.

It appears to me, therefore, that the order appealed against is right with reference to the words "Stone Ale" or "Stone Ales," and as it has not been impeached on any other ground, it should, I think, be affirmed in its entirety.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 12th May 1891.

Solicitors for appellant: *Ridsdale & Son, for Bradley & Son, Liverpool.*

Solicitors for respondents: *Chester & Co.*

[HOUSE OF LORDS.]

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THE REV. SIR JAMES ERASMUS PHILIPPS, BART., AND GEORGE CHAMBERS . . . . . } APPELLANTS;

AND

JOHN EDMUND HALLIDAY . . . . RESPONDENT.

Ecclesiastical Law—Church—Pew—Right Appurtenant to House—Evidence—Long User and Acts of Ownership—Presumption of Legal Origin—Prescription—Faculty.

A pew may be annexed to a dwelling-house in the parish by a faculty, and a faculty may be presumed upon evidence of exclusive possession and repair for a long period.

The owner of a freehold dwelling-house brought an action in respect of the disturbance of his possession of a pew in the parish church. There was evidence that for more than seventy years he and his predecessors in title had occupied the pew, kept it locked, and repaired it:—

Held—upon the principle that a legal origin ought to be presumed if a legal origin be possible—that the grant of a faculty ought to be presumed, and that the action was maintainable; and that this was so though it appeared that 200 years ago the then lessee of the house (before he became the freeholder) first acquired possession of the pew in a manner which gave no legal title, the subsequent enjoyment not being more con-

sistent with the illegal origin than with the presumption of a later faculty.

The decision of the Court of Appeal (23 Q. B. D. 48) affirmed.

APPEAL from an order of the Court of Appeal (Lord Esher M.R. and Bowen and Fry L.JJ. (1)), reversing a judgment of Day J.

The facts are set out and the arguments discussed in the judgment of Lord Herschell. It is only necessary to say that on

March 19, 20, *M. Muir Mackenzie*, followed by *Finlay* Q.C. (Sir *W. Phillimore* with them) for the appellants, contended that a faculty for the pew ought not to be presumed, looking at the known origin of the pew, its history, and the entries in the church books. [They cited *Corven's Case* (2), alias *Garven and Pym's Case* (3); *Hussey* v. *Leyton* (4); *Ashly* v. *Freckleton* (5); Watson's Clergyman's Law, 4th ed. ch. xxxix.; *Stocks* v. *Booth* (6); *Rogers* v. *Brooks* (7); *Walter* v. *Gunner and Drury* (8); *Fuller* v. *Lane.* (9)

R. Henn Collins Q.C. and *A. B. Kempe* for the respondent, were not heard.

LORD HERSCHELL:—

My Lords, this is an appeal from a judgment of the Court of Appeal reversing a judgment of Mr. Justice Day. The action was brought by the respondent to recover in respect of a disturbance of him in his possession of a pew in the church at Warminster to which he alleged he had a right. The order appealed from declared "that the plaintiff was entitled to pew No. 10 (now pulled down) in the south aisle of the parish church of Warminster, and is now entitled to a pew on the site of such old pew as appurtenant to his house, known as the Mansion, situate in Warminster." It further ordered an injunction to restrain any interference by the defendants, the vicar and churchwardens, "with the plaintiff in his use and enjoyment of such pew."

(1) 23 Q. B. D. 48.
(2) 12 Rep. 105.
(3) Godbolt, 200.
(4) 12 Rep. 106.
(5) 3 Lev. 73.
(6) 1 T. R. 428.
(7) Ibid. 431, n.
(8) 1 Hag. Con. 314.
(9) 2 Addams, 419.

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My Lords, the facts upon which the plaintiff relies for the purpose of establishing the right which he claims are these:—For a very long term of years—certainly from the year 1680—he and his ancestors have been possessed of this house, called the Mansion, situate in Warminster. It would appear that at first that possession was only in respect of a leasehold interest, but that the freehold was acquired in the year 1687; so that from the year 1687 down to the present time, Mr. Halliday and his ancestors have been the freeholders of that house. It is also clear that as far back as memory can go (putting aside for the present all the entries in the church books), and indeed it may be said to some extent beyond that, by reason of a fact to which I will allude in a moment, the plaintiff and his predecessors in title have occupied this pew, and exclusively occupied it. That mere possession in itself, even going back, as I think it is shewn to do apart from the church books, to a period prior to 1819—that is to say, nearly seventy years before this controversy arose—would not suffice. But in addition to that evidence of possession, there is evidence that the pew was repaired by Mr. Halliday's predecessors in title; that it was so repaired as far back as in the year 1819; and I think the fair inference of fact to be drawn (and I do draw it) is that that was not the commencement of this dealing with the pew, but that the pew had been in the possession of the family prior to that time, and had been dealt with at the earlier date in the same way as it was dealt with then. I think it is clear that at that time the pew was locked, and that the key which gave access to the pew was in the possession of Mr. Halliday, because the key was returned to him on the 5th of October 1819 by the person employed in making the repairs of the pew when those repairs had been effected, which I take as a clear indication (I draw at all events the inference of fact) that the pew was then kept locked by means of a key, the possession of which Mr. Halliday retained. Therefore, my Lords, we have this, that the owners of this mansion, situate in the parish of Warminster, have for a period approaching seventy years, and, as I draw the inference of fact, for a period longer than seventy years, possessed and occupied this pew, kept it locked, and repaired it.

Now I apprehend that where there has been long-continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title. I hardly think that the proposition so stated was assailed by the learned counsel for the appellants.

The question therefore arises, was it possible for this right, which the plaintiff claims, to have had a legal origin, or was it an alleged claim of right which could only have come into existence by an encroachment on the part of the person who claimed it? It has been said by the learned judges in the court below that such a right as this may be gained by a faculty or by prescription. The learned counsel for the appellants at your Lordships' bar contest that assertion. It does not seem to have been, as far as I can gather, much discussed in the court below, because the judgments are entirely silent upon the point, but the appellants put their case in this way. They admit that a right might be gained by prescription, but say that in the present case the right could not have been so gained, inasmuch as it can be shewn to have had an origin since the time of legal memory; and then they contend that a title by prescription being out of the case there could be no title acquired by means of a faculty, and that therefore if the possible title by prescription be once got rid of, there exist no other means by which a title could legally have been acquired.

That proposition seems to me to be entirely contrary to what has been laid down as the law for a very long period. In the case of *Stocks* v. *Booth* (1), which was decided as long ago as the year 1786, more than a century ago, Buller J. says: "In an action on the case for disturbing the plaintiff in his pew, for which trespass will not lie, the plaintiff must prove a right either by prescription or by a faculty"; and in a later part of the judgment he says: "A pew may be annexed to a house by a faculty as well as by prescription, for the latter supposes a faculty." Now, my Lords, the law could not be more distinctly

(1) 1 T. R. 428.

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enunciated than in those words which I have read of that very learned judge, who certainly may be regarded as at that time an adequate exponent of the Common Law of England.

I find that in the year 1798, a few years only after the date of the judgment which I have just read, a similar question came for consideration before Lord Stowell, then Sir William Scott, in *Walter* v. *Gunner and Drury* (1), and he uses this language: "A person claiming a pew must shew either a faculty, or prescription, which will suppose a faculty. But mere presumption is not sufficient without some evidence on which a faculty may reasonably be presumed." I shall have occasion hereafter to refer to what he says about the evidence in that case, but this further passage is material for the moment: "The possession must be ancient and going beyond memory; and though on this subject I do not mean the high legal memory it must be larger than appears in the circumstances of this case." Therefore, my Lords, there again the law is laid down by one of the most distinguished exponents of the ecclesiastical law in language very similar to that which was used a few years before by Buller J. in the action in the King's Bench. It is scarcely possible to conceive more authoritative statements of the law derived from individual judges than those to which I have just alluded. And from that time down to the present no case has been cited to your Lordships either in the Ecclesiastical Courts or in the Courts of Common Law which throws the slightest doubt on the statements of law which I have laid before your Lordships, or suggests that the law is other than it would appear to be from those statements. One of the learned counsel for the appellants, Mr. Mackenzie, in his able argument brought to your Lordships' notice certain earlier authorities, and relied to a considerable extent upon the statement in Watson's work that the law had down to that time been believed to be that faculties could not be granted in the way that some persons supposed. My Lords, the passage referred to is really only an academic discussion of the different views which have prevailed with regard to the law—it can hardly be regarded as an authority. And I must say for myself, although ingenious arguments may be founded upon

(1) 1 Hag. Con. 314, 322.

them, that when the case in Lord Coke's Reports and in Godbolt's Reports is considered, it does not seem to me that there is anything there really inconsistent with the views which were expressed at the later period to which I have alluded by the learned judges whose language I have quoted. At all events, it appears to me that when you have these plain unequivocal statements of the law made over a century ago, or something like a century ago, unassailed by any criticism or counter decision since, inasmuch as they deal with a matter affecting rights of property or interests akin to rights of property, it would be in the highest degree dangerous to interfere with them or to overrule them unless a very strong and conclusive case should be established, which I think it is impossible to say has been done in the present case.

Therefore, my Lords, I cannot see any reason to doubt that there may be annexed to a house, as appurtenant to it, by means of a faculty, the exclusive right to a pew, which will entitle any person disturbed in that right to bring an action of disturbance in order to maintain it.

Now supposing that to be established, then upon the facts which I have already put before your Lordships as proved in this case, the question arises whether a grant of a faculty ought not to be presumed; because, as I have said, there has been this long-continued possession and there have been these other acts to which I have referred, and if a grant of a faculty would have made them legal ought that faculty not to be presumed? There again I think your Lordships are not without authority. In the case before Lord Stowell of *Walter* v. *Gunner and Drury* (1), to which I have already referred, he says that mere presumption is not sufficient without some evidence on which a faculty may reasonably be presumed. Now what is the evidence upon which Lord Stowell thought that a faculty might reasonably be presumed? "The strongest evidence of that kind is the building and repairing time out of mind; for mere repairing for thirty or forty years will not exclude the Ordinary. In this case the person was offered a particular space, and if he had built on it it would not be sufficient to supersede the authority of the Ordinary.

(1) 1 Hag. Con. 314, 322.

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The possession must be ancient and going beyond memory; and though on this subject I do not mean the high legal memory it must be larger than appears in the circumstances of this case." Therefore in the opinion of Lord Stowell if you find that beyond the period of memory, not the legal term, but beyond the period of living memory, the pew has been thus repaired then you are entitled to presume a faculty.

My Lords, in the present case I do not think it can be contended that the facts do not bring it within the purview of the doctrine laid down by Lord Stowell. And in the case of *Rogers* v. *Brook* (1) Willes J., a very learned judge, said, referring to a possession of only thirty-six years, that after so long a possession he would presume anything in favour of the plaintiff. No doubt that is a strong expression, and possibly there may be presumptions that ought not to be made even under such circumstances as those, but I think it points out how emphatically the view has been entertained by learned judges that where there has been long-continued possession which is consistent with a legal title every reasonable presumption ought to be made in order to support the possession and maintain it as having been of right.

So far I have dealt with the case apart from the entries in the books upon which the learned counsel have principally relied; because I think, apart from the point whether such a right as this could be granted by a faculty, they really hardly seem to contest the proposition that, if it could be granted by a faculty, it would be legitimate and proper to presume a faculty, if nothing more appeared than the circumstances to which I have called attention.

My Lords, before leaving the question of the grant of a faculty, I may call attention to Sir John Nicholl's judgment in *Fuller* v. *Lane* (2), in which he adopts the view that, in the case of these so-called prescriptive rights, there had once existed faculties, though the faculties themselves had been lost, and in which he clearly indicates the view that it was within the discretion of the Ordinary to grant a faculty appropriating a pew, and he points out the strong reasons which existed for the Ordinary using that

(1) 1 T. R. 431, n. (2) 2 Addams, 419, 426.

power very sparingly, instead of using it as he said that in the past it had been used, too lavishly. One of the reasons why he thinks that it should be very sparingly used, and why the probable condition of the parish in the future should be looked at as well as the past condition, being that, if the faculty is once issued, it is good and valid even against the Ordinary himself.

I pass now to the entries in the church books, which are relied upon by the learned counsel for the appellants. It appears that in the year 1680 there is this entry: "Rec^{d} of Mr. Edward Halliday for ye ground wheron hee has bilt a Seat for his wife and family 5*s.* 0*d.*" In the same book there are entries of a similar character relating to two or three other sites upon which pews have been erected, for which similar payments have been made. The argument on behalf of the appellants is this: Here, they say, we see the origin of this alleged right—it arose out of the erroneous supposition of the vicar and churchwardens, or the churchwardens, that they could sell to a parishioner a portion of the site of the church, and that having done so, and he having erected a pew upon it, a good title to it vested in him which he could assert and maintain at law. My Lords, they are, of course, perfectly justified in saying that a transaction of that sort is one which could have no validity. Their position, then, is this: We shew that in its origin this alleged right was acquired in a manner not legal, and that being so, you have no right to presume (as you would have but for the existence of that entry and the information which it gives) that the right has been acquired in a legal manner, and therefore to presume, if necessary, a faculty for the purpose of so establishing it. I am unable to accede to that proposition. It cannot be disputed, whatever may be said of the earlier period, that at any time from and after the year 1687—that is, within seven years of this original arrangement, a faculty (supposing that I am right in the propositions of law which I have already put before your Lordships) could have been granted which would have given a complete legal title. Why should the House or the Court refuse to presume, or abstain from presuming, a legal title to this alleged right, which they would otherwise have presumed, because in its inception it may be shewn to have rested upon a foundation which would not support it? Why

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does not the doctrine which I have referred to, the maxim which has been so often acted upon, apply just as well to the acts necessary to confirm a title originally invalid as to the acts necessary to create a valid title in the first instance? It seems to me that the argument of the learned counsel for the appellants must go this length, that for however many centuries it may be proved that an alleged right has been asserted and enjoyed, if it can be shewn in its inception to have rested upon a foundation invalid in point of law, then, although the title might have been perfectly well validated by some act which you would otherwise have presumed, you are never justified in presuming that act to have been done. My Lords, I am perfectly unable to see upon what basis such a principle can rest. It seems to me that the very reason which has been held not only to justify, but almost to compel, the Court to make presumptions of this description, applies just as much in the latter case as in the former. No doubt if the subsequent enjoyment is shewn to be consistent rather with the right thus invalidly acquired, or supposed to be acquired, than consistent with its having been made a legal right, the presumption would be unjustifiable, because you would then have its illegal origin shewn, and you would have an enjoyment consistent rather with that illegal origin than with any presumed legal origin. Obviously, under such circumstances, you could not be justified in making the presumption—the presumption would be rebutted by the facts. But is there any ground for asserting this in the present case? I do not see that there is anything in the subsequent entries in the books or in the acts which have been done consistent rather with those acts having been done, or those entries having been made, upon the basis of the enjoyment of the right under the original transaction of 1680, than done or made in relation to a right which had been validated by a subsequent faculty. All that can be said is that there is no mention of the word "faculty." What we find is, that this pew with others was certainly treated differently from most of those in the church. The way in which they were treated I will say something about in a moment. But when we first have an account of this pew in the earliest book after the one in which the original entry is made, we find this pew with

three others treated exceptionally, and no entry made against them, or with regard to them, whereas in other cases there are the sums paid and the lives upon which they are held, and so on. In the next book we find this pew treated as a family pew. I believe it is part of the same book; but I mean the next series of entries. And then in a later book we have the pew spoken of as freehold. I cannot see how there is anything in that in the slightest degree inconsistent with the right existing, by virtue of some faculty having been granted, or why it is necessarily referable only to an enjoyment by reason of the original transaction of 1680. Of course, if the entry had stated that there had been a faculty, there would have been an end of the case; but it is incumbent, as it seems to me, upon the appellants, in order to establish the position which they take up before your Lordships, to make out not only that the entries in the book are consistent with an enjoyment of the precarious nature which they suggest, but that they are consistent rather with that than with an enjoyment lawfully acquired. I am unable to see in any way that they are so.

But, then, it is said that you ought to come to that conclusion, because you find that the churchwardens of this parish for a long period of time were dealing in other cases with regard to other pews in a manner in which they had no right to deal, that they were letting them for lives in a fashion which the law would not sanction, and that inasmuch as you find that they were doing so in the case of other pews, and that there was a sort of illegal course of dealing with pews going on in this parish, these circumstances ought to make you abstain from the presumption which otherwise you would be justified in making. There, again, my Lords, I am quite unable to accede to that argument. It appears to me, as I have said, that every ground which ordinarily justifies a presumption exists in the present case. There is a long period of enjoyment coupled with acts which would have been illegal unless there had been a faculty; because I do not suppose that it would be for a moment disputed that without a faculty, or some legal right of that description, no one would be entitled to the exclusive possession of a pew, and to lock it, and keep others out of it, or to tamper with the fabric by repairing it.

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My Lords, for these reasons, I think that the judgment of the Court below is right, and ought to be affirmed; and I move your Lordships accordingly.

LORD WATSON:—

My Lords, I am of the same opinion. I think the recent and better authorities are clear to the effect that a pew may be annexed to a dwelling-house within the parish either by a faculty or by prescription, which supposes a faculty; and I am satisfied that the possession of the pew in question, which has been had by the respondent and his predecessors in the ownership and occupancy of the mansion, is sufficient both in its character and duration to raise the presumption of a lost faculty.

I shall say no more upon the subject, because I can add nothing to the reasons which have been assigned in the judgments of the Appeal Court, and in the opinion just delivered by my noble and learned friend, in all of which I fully concur.

LORD MACNAGHTEN:—

My Lords, I also think that the Court of Appeal was quite right in presuming a lost faculty in support of the respondent's long-continued possession. It is quite true that in its origin the appropriation of this pew to Mr. Edward Halliday and his family in 1680 appears to have been invalid; but, having regard to the fact that shortly afterwards a material change took place in Mr. Halliday's right to the mansion he occupied in this parish, and that he acquired the fee of it in 1687, I think it is not unreasonable to suppose that at that time, or shortly afterwards, when he probably had competent legal advice, steps should have been taken to perfect his title to the pew, which seems to have been considered a valuable appendage of the mansion. The probability of this view is not lessened, in my opinion, by the obvious illegality of the original appropriation.

LORD MORRIS:—

My Lords, I entirely concur.

LORD HANNEN:—

My Lords, I also concur.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 20th March 1891.

Solicitors for appellants: *Brooks, Jenkins & Co.*
Solicitor for respondent: *J. J. Garrod.*

[PRIVY COUNCIL.]

J. C.* 1891 ~~ *Feb.* 11.

LAKE'S PATENT.

Patent—Prolongation—Insufficiency of Accounts.

Where the accounts filed by a patentee shewed not the result of the books, but the accountant's correction of them, and where it also appeared that the books themselves had been kept in such a way that without a very long, minute, and laborious investigation it was impossible to say whether he had been adequately remunerated or not :—

Held, that a petition for prolongation must be dismissed.

THIS was a petition of Messrs. Ibbotson, Brothers & Co., Limited, of the Slot Steel and Iron Works, Sheffield, for an extension for an additional term of fourteen years or any less term of certain letters patent of which they were the assignees. Those letters had originally been granted in 1877 to William Robert Lake, on behalf of A. B. Ibbotson, the original inventor. The invention in question consisted of "improvements in the construction of joints for uniting and securing the ends of railway rails, and in the bolts or screws and nuts to be used in connection therewith or with other rail joints." Its object was to prevent the accidental slackening or loosening of bolts, screws, and nuts, by vibration or otherwise, and to render the same more permanently and reliably tight without using for this purpose any separate or special contrivances. The point decided was as to the nature and sufficiency of the accounts filed by the petitioners in support of their application.

Sir *Horace Davey*, Q.C., *Moulton*, Q.C., and *Wallace*, for the petitioners.

The *Attorney-General* (Sir *R. Webster*), and *Sutton*, for the Crown.

The cases referred to were *Saxby's Patent* (1), *Johnson's Patent* (2), *Adair's Patent* (3), and *Duncan & Wilson's Patent* (4).

* *Present*:—Lord Watson, Lord Hobhouse, Lord Morris, and Sir Richard Couch.

(1) Law Rep. 3 P. C. 292.
(2) Ibid. 4 P. C. 79.
(3) 6 App. Cas. 176.
(4) Reports of Patent Cases, vol. i., p. 257.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

In this case their Lordships have come to the conclusion that the petition must be dismissed because it is not shewn, and in the materials before the Committee it cannot be shewn with propriety on this occasion, that the patentee has not been adequately remunerated. In order to shew that the patentee should keep his accounts in a way which would enable the Crown officers to whom they are produced and this Committee, and indeed members of the public, to form some judgment on the question whether he has or has not received adequate remuneration. And not only should the accounts be kept in such a form, but they should be produced before this Committee in such a shape as not to require a long and minute investigation of supplemental accounts in order to understand what is the result of them. The principle has been stated on both points very clearly on several occasions by this Committee. In *Bett's Patent* (1), as far back as 1862, it was stated, "there can be no difficulty in a patentee beginning from the first to keep a patent account distinct and separate from any other business in which he may happen to be engaged; he knows perfectly well that if his invention is of public utility and he has not been adequately remunerated he will have a claim for an extension of the original term of his patent. It is not, therefore, too much to expect that he should be prepared when the necessity arises to give the clearest evidence of everything which has been paid and received on account of the patent." That refers to the mode in which the accounts should be kept. In *Saxby's Patent* (2) the Committee made some observations on the mode in which the accounts should be produced. Lord Cairns, in delivering his judgment, says: "It is the duty of every patentee who comes for the prolongation of his patent to take upon himself the onus of satisfying this Committee in a manner which admits of no controversy what has been the amount of remuneration which in every point of view the invention has brought to him, in order that then their Lordships may be able to come to a conclusion whether that remuneration may

(1) Moore's P. C. (N.S.) 49. (2) Law Rep. 3 P. C. 292.

J. C. 1891 LAKE'S PATENT.

fairly be considered as a sufficient reward for his invention or not. It is not for this Committee to send back the accounts for further particulars, nor to dissect the accounts for the purpose of surmising what might be their real outcome if they were differently cast; it is for the applicant to bring his accounts before the Committee in a shape which will leave no doubt as to what the remuneration has been which he has received." Now their Lordships are of opinion that the present petitioner fails on both those points. The accounts produced do not shew that which is the first thing they should shew, the result of the books of the business—they only shew the accountant's correction of them. To take, for instance, the year which has been selected as an example, the year 1885, the purchases of steel washers, &c., are stated at 2500 tons. That would seem to be a statement from the books, and for some time their Lordships were under that impression; but it is not a statement from the books; it is the result of a process gone through by the accountant by which he brings out that statement as a correction of the books; and there is not on the face of these accounts any statement of what the books shew as the quantity of those purchases. Again, on the same page, is the item, "Scraps and borings." They, it is stated, have been credited to the rail joint department of the business (that is, the patent department) at a higher rate per ton than the sale price at the time, and the excess has been written back by the accountant. The account does not shew what the books state as the rate per ton; it does not shew what the sale price at the time was, nor how it has been arrived at; it does not shew what the higher rate was. It is an item which it is impossible to understand without entering on those minute investigations which it is improper to call upon this Committee to make. It must be remembered that the patentee has all the materials in his possession, and that to a certain extent it is an ex parte application—that is to say, their Lordships must depend upon him and his accountant and witnesses to give a correct statement of the result of the accounts. Even if there is opposition, it is difficult to conduct an investigation in the way in which it would be conducted between partner and partner, or in the case of a creditor overhauling the accounts of a partnership. It is one of

those cases in which you must depend on the applicant, at all events in the first instance, to give you such accounts as would lead without long investigation to a clear understanding of the state of things. It would be easy to go into other items; but the three items of scrap and borings, steel for the rail joint department, and wages, are three large items, in the result involving some £20,000, which might make the whole difference on the question whether the patentee has been adequately remunerated or not. On these points the accounts give no sufficient information. Perhaps it is still more important that the books have been kept in a way which makes it now impossible without a very long, minute, and laborious investigation, to say whether the patentee has or not been adequately remunerated. What is now asked is, that there shall be a complete unravelling and recasting of these accounts. It is not even as if there were no departmental accounts in the business kept at all. Possibly in that case it might have been more easy to attribute by some rough principle of proportion a proper account of expenditure and receipts to the patent or rail joint department; but the books are kept so as to shew the departmental proportion of large general expenses, and the results that they bring out are very largely different, to the extent on the whole of £20,000, from the results brought out by the accountant. The differences between the books and the results as brought out by the accountant are very obscure. The item of scraps and borings is stated in so obscure a way that it would require a long investigation to come to any accurate result upon it, and that is what this Committee ought not to be called on to undertake. Their Lordships do not mean to say that there might not be a case in which it would be proper to unravel and investigate accounts. Frauds might have been committed, or there might be some peculiarity of the business which would render it necessary to do so either by some proceeding here, or with the aid of the Crown, before the parties arrived at this stage of the business. But then a special case should be made for that purpose. In this case the petition tells us nothing about any necessity for going through those operations; it does not explain why the books were kept in this way, nor why it is now proper to alter the accounts; it does not even say that they are to be

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altered; it merely states that the petitioner was inadequately remunerated, and refers us to the accounts which are laid upon the table, from which their Lordships cannot judge whether the fact is so or not. For these reasons their Lordships think that the petition must be dismissed.

Solicitors for the petitioners: *Janeways, Gribble, Oddie, & Sinclair.*

Solicitor for the Crown: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.* 1891 Jan. 28.

PLOMLEY . . . . . PLAINTIFF;

AND

SHEPHERD . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Act 26 *Vict. No.* 20, *ss.* 1, 2—*Construction—Devolution of Wife's Realty after Husband's Tenancy by the curtesy expired.*

The effect of New South Wales Act, 26 Vict. No. 20, sects. 1, 2, is to give all land which previously descended to the heir to the next of kin of the predecessor:—

Held, that the proviso which follows to the effect that "nothing herein contained shall give to any husband on the death of his wife intestate any greater interest in the real estate of his wife, or in the produce thereof upon sale than a tenancy for life by the curtesy," does not operate to prevent such real estate after the death of the husband descending under the Act to the wife's next of kin instead of to her heir-at-law.

APPEAL from an order of the Primary Judge in Equity of the above Court (Nov. 15, 1889).

The question decided was whether, under the Real Estate of Intestates Distribution Act of 1862, certain moneys representing the real estate of a married woman who died intestate in the lifetime of her husband, are divisible amongst her next of kin, or whether such moneys are payable to the appellant as assignee

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

of the interest of her heir-at-law? The Primary Judge decided that the moneys are divisible among the next of kin.

Cozens-Hardy, Q.C., *Serrell*, and *W. T. Raymond*, for the appellant, contended that the beneficial interest in the real estate in question, beyond the tenancy by the curtesy, was not disposed of or affected in any way by the Act. Consequently it devolved by the law, independently of the Act, and the heir-at-law was entitled. There was nothing in the law relating to the husband's right to the separate personalty of his wife in respect of which she died intestate which would conflict with the right now claimed on behalf of the heir-at-law. [Reference was made to *Proudley* v. *Fielder* (1); *Smart* v. *Tranter* (2); *Goodtitle* v. *Pugh* (3)].

McSwinney, for the respondent, was not called on.

The judgment of their Lordships was delivered by

LORD WATSON:—

This is a short, and as it appears to their Lordships, a very plain case. It turns upon the construction of two clauses in the New South Wales Act, No. 20 of the 26 Vict., which is entitled, "An Act to alter the Succession to Real Estate in cases of Intestacy." Stripped of unnecessary details, the material facts are these. Ann Shepherd, or Goody, a married lady, died in 1866 possessed of a ninth share of a landed estate. She was survived by her husband, who, until his death in 1870, enjoyed a life rent tenancy by curtesy of his wife's ninth share. The proceeds of the estate, which has been converted, but not so as to affect in any way the rule of succession applicable to it, are claimed on the one side by the appellant, who is assignee of the heir-at-law of the lady, and on the other side by the administrator of her personal estate.

Which of the two parties is entitled to the fund is a question depending entirely upon the construction of the Act. In considering the clauses which have a direct bearing upon the question, it is proper to keep in view that the purpose of the

(1) 2 My. & K. 57. (2) 43 Ch. D. 595.
(3) 2 Merivale, 348, and cited in Fearne on Contingent Remainders, p. 573.

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legislature, as explained in the preamble of the Act, was to alter the rule then in force, by which upon the death of an intestate owner his land passed to his heir-at-law. The first section of the statute simply declares that "all land which by the operation of the law relating to real property now in force would upon the death of the owner intestate in respect of such land pass to his heir-at-law, shall instead thereof pass to and become vested in his personal representatives." It makes no provision with regard to the manner of administration. Reference is made at the end of the clause to the descent or vesting of chattel real property, not for the purpose of limiting the enactment, which applies to all lands without exception, but simply for the purpose of indicating the mode in which, and the effect to which, land is to vest in the personal representative. The second clause of the Act is the important one. It provides in the first place that lands held in trust or by way of mortgage passing to personal representatives shall be subject to the trusts and equities which previously affected them, in the same manner as if they had descended to the heir, and then declares that "all other lands so passing shall be included by the administrator in his inventory and account and be disposable in like manner as other personal assets without distinction as to order of application for payment of debts or otherwise."

That direction applies to all land vested by virtue of sect. 1 in the personal administrator other than land which was held by the deceased in trust or by way of mortgage; and the combined effect of the two clauses is to give all land which previously descended to the heir to the next of kin of the predecessor. But there follows a proviso which qualifies that enactment, and the appellant contends that the effect of the proviso is to restore to the heir-at-law the right of succession of which the enactment deprives him, whenever the intestate is a lady who, at the time of her death, was the wife of a living husband. Their Lordships are unable to accept that interpretation of the proviso. It is in these terms: "Provided that nothing herein contained shall give to any husband on the death of his wife intestate any greater interest in the real estate of his wife or in the produce thereof upon sale than a tenancy for life by the curtesy." That

proviso shews conclusively that the provisions of the Act which precede it were intended by the legislature to apply in terms to the case of land left by an intestate married woman whose husband survives her. It recognises the application of the statute, and its plain object was to prevent the husband taking a larger interest than would have fallen to him if the rule of succession had not been altered. Had the proviso been omitted, the surviving husband would have taken, not a right of curtesy, which is a bare estate for life, but a right of fee in the land or its proceeds. To prevent that result, the legislature has provided that his right shall be limited, but their Lordships find it impossible to infer from that limitation that the legislature intended the remainder which is not given to the husband to lose its character of personal assets divisible among the next of kin, and to revert to the heir-at-law. There is not a single expression in the Act which lends plausibility to a suggestion of that kind. The proviso was introduced just because the effect of the enactment was to make land moveable for all purposes of intestate succession, and except in so far as the proviso enacts otherwise it must so remain. But the proviso does not deal at all with the character of land quoad succession. It simply limits the interest of the husband in that which has already been made distributable as personalty.

Their Lordships will accordingly humbly advise Her Majesty that the appeal ought to be dismissed. The appellant must bear the costs of the appeal.

Solicitors for the appellant: *P. J. Gordon & Son.*
Solicitors for the respondent: *Hemsley & Hemsley.*

[PRIVY COUNCIL.]

J. C.* 1890 *Feb.* 7, 8, 12; *Dec.* 11, 12. 1891 *Jan.* 24.

GIBBS (DEFENDANT). . . . . APPELLANT;

AND

MESSER (PLAINTIFF) McINTYRES AND CRESSWELL (DEFENDANTS). . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Transfer of Land Statute—Forged Transfer—Fictitious Transferee—Forged Mortgage—Effect of Registration.

The Victorian "Transfer of Land Statute" protects those who derive a registered title bonâ fide and for value from a registered owner. Accordingly they need not investigate the title of such owner, for they are not affected by its infirmities. But they must ascertain at their own peril his existence and identity, the authority of any agent to act for him, and the validity of the deed under which they claim.

The name of a registered owner having been removed in favour of a fictitious and non-existing transferee as the result of a forged transfer, a mortgage purporting to have been executed by such transferee was subsequently put upon the register by bonâ fide mortgagees.

In a suit by the true owner against the registrar, the mortgagees, and the perpetrator of the fraud:—

Held, (*a*) that the plaintiff's name must be restored to the register. (*b*) That the mortgage was invalid, and did not in favour of the mortgagee constitute an incumbrance on the plaintiff's title; though under the Act it would have that effect in favour of a bonâ fide registered assignee thereof.

APPEAL from an order of the Supreme Court (10th of November, 1887), affirming with a variation an order of Webb, J. (18th of August, 1887), which was to the effect that the Registrar of Titles should pay to the respondent, Mary Stuart Messer, out of the assurance fund established by the 30th and other sections of the Transfer of Land Statute, her costs of her action and all moneys from time to time paid by her for interest in respect of an alleged mortgage for £3000, under which the respondents McIntyre claimed to be mortgagees, and also all moneys necessarily paid by her for principal, interest, and costs to redeem the said mortgage.

* *Present*:—LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD HERSCHELL, LORD MACNAGHTEN, LORD MORRIS, and MR. SHAND (LORD SHAND).

The facts of the case are stated in the judgment of their Lordships.

The question in the appeal stated from the appellant's point of view was whether, according to the true construction of the Transfer of Land Statute (Act No. 301), a registered proprietor of land can be said to have been deprived of land within the meaning of sect. 144, and consequently to have become entitled to compensation out of the assurance fund by reason of a transfer from him to a non-existent person under a fictitious name having been forged, and by reason of such fictitious name having been substituted for his on the register as the proprietor, and by reason of a forged mortgage from such fictitious person to a registered mortgagee who had bonâ fide advanced money on the security of such land.

The case was twice argued, on the first occasion before a committee composed as noted below.*

Sir *H. Davey*, Q.C., *Finlay*, Q.C., and *Garner*, for the appellant.

Rigby, Q.C., and *Sargant*, for Mrs. Messer.

The Attorney-General (Sir *R. Webster*), and *Rashleigh*, for the McIntyres.

For the appellant it was contended that there was nothing in the Transfer of Land Statute which could be relied on as giving validity to any document which purported to be a transfer either to or from a non-existing person, although it might be in a name that had been placed upon the register. Nor was there anything in the Act which could give validity to a transfer purporting to be by a transferor who had never signed, or to a transferee who had never signed. Even if such a non-existing person could be held to have given under the operation of this Act a title to a bonâ fide transferee without notice, still a document which only purported to create an incumbrance against himself, would not bind the land. The Act protects those who acquire the legal estate, not those who under a statutory mortgage acquire a mere interest in land.

* *Present at the first hearing:*—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR BARNES PEACOCK.

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If the Act is examined in detail, its provisions, as well as its general scheme and object, would be defeated if the transactions in this case were upheld and the assurance fund held answerable for them. It would not give certainty to title according to the preamble if the registered proprietor were liable to be deprived of his estate by a forged transfer purporting to be executed by him. The "dealings with land," which are the subject of the Act, must mean actual dealings by the actual registered proprietor, not dealings by forgers who are strangers to it. Further, it cannot be said that a fictitious person who has under sect. 43 obtained a certificate of title under a forged transfer, is a proprietor of land under the operation of the Act within the meaning of that section. Sect. 47 does not help the other side, for it relates to a certificate in favour of a real proprietor and real applicant, not in favour of a fictitious name. No certificate was issued in this case to Cameron or to the mortgagees in such manner as is contemplated by the provisions of the Act. The transfers effected were not transfers within the meaning of the Act. Fraud in sects. 49 and 50 does not include the fraud of the transferor. Sect. 144 only gives a right of action against the registrar if there be some existing person in whose name registration has been erroneously effected. The whole proceedings upon which the names of the McIntyres were entered on the register were a nullity, and passed no title to the respondents. It was not the intention of the Act to guarantee that a particular name on the register represented a real person. Persons dealing with land on the faith of such name must ascertain for themselves the nature and effect of the particular transaction they make. If a binding transaction is made with a real registered owner, the Act guarantees that owner's title, but nothing more. His existence, the authority to act for him, and the genuineness of any deed which purports to be signed by him, are matters for which the respondents and not the Act are responsible. Reference was made to *Cullen* v. *Thompson* (1), *Fotheringham* v. *Archer* (2), *Hassett* v. *Colonial Bank of Australia* (3), *Oakdar* v. *Gibbs* (4), *Ogle* v. *Aedey* (5).

(1) 5 Vict. L. R. E. 147.
(2) 5 Wyatt Webb & A'Beckett, 95.
(3) 7 Vict. L. R. L. 381.
(4) 8 Vict. L. R. L. 380.
(5) 13 Vict. L. R. 467.

For the respondents, McIntyres, it was contended that the land comprised in their mortgage was at the date of that transaction land under the operation of the Transfer of Land Statute. If Cresswell had been on the register instead of Cameron, and had executed the mortgage, the transaction could not have been impeached, for Cresswell's title would have been as it were guaranteed by the legislature. But in fact Cameron and Cresswell were the same person. The former was a name assumed by the latter, and the fictitious name represented a real owner whose registration and transactions were governed by the Act. Cresswell, as registered owner, though no doubt registered in an assumed name, effected a mortgage by a registered instrument, and thereby granted a title which was indefeasible under the Act. Reference was made to the preamble, sects. 3, 4, 61, 47, 34, 40, 84, 36, 42, 49, 50; and to *In re Imperial Mercantile Credit Association, Richardson's Case* (1); *In re Hercules Insurance Company, Pugh and Sharman's Case* (2). The McIntyres were innocent purchasers or mortgagees for value, without any notice, actual or constructive, at the time of making the mortgage, of any claim of the plaintiff, or of any fraud of Cresswell. The respondents, under all the circumstances of the case, were entitled to the remedy out of the assurance fund provided by sect. 144, which was applicable to their case.

Sir *Horace Davey* replied.

The judgment of their Lordships was delivered by

LORD WATSON:—

This appeal depends upon the construction of the Transfer of Land Statute, No. 301 of 1866, which established a register of titles and incumbrances for the Colony of Victoria, in order "to give certainty to the title to estates in land, and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive."

The facts of the case, so far as they bear upon the question which we have to decide, may be shortly stated. The plaintiff,

(1) Law Rep. 19 Eq. 588. (2) Law Rep. 13 Eq. 566.

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Mrs. Messer, who resides in Scotland, was entered in the register as proprietor in fee simple, free from incumbrances, of certain parcels of land in the district of Hamilton. In the year 1884, she was joined by her husband, who left behind him in the Colony, in the custody of Charles James Cresswell, a solicitor at Hamilton, her duplicate certificates of title, and also a power of attorney, by which she had authorized her husband to sell, mortgage, or otherwise dispose of the lands.

During their absence from the Colony, Cresswell forged a transfer of the lands by Mr. Messer, as his wife's attorney, to "Hugh Cameron, of North Hamilton, county of Dundas, grazier." It is admitted that there was no such person as the transferee in existence. Cresswell then, representing himself to be agent for Hugh Cameron, produced the transfer, dated the 11th of August, 1885, along with Mrs. Messer's certificates of title, to the registrar, who cancelled each folio in which her name was entered, registered Hugh Cameron as proprietor upon a new folio, and issued the usual duplicate certificate in his name.

Still professing to act as agent for Hugh Cameron, Cresswell next arranged with the defendants, the McIntyres, for a loan of £3000, to be secured by mortgage. He wrote, with his own hand, a deed of mortgage, bearing date the 10th of October, 1885, purporting to be executed by Cameron, he himself being the subscribing witness, whose attestation is required by the statute. Upon the faith of that document the McIntyres paid the money to Cresswell, who forthwith appropriated it to his own purposes. When they presented their mortgage for registration, the registrar declined to enter it until he was satisfied that the Hugh Cameron registered as proprietor was not identical with a person of the same name who had recently been made bankrupt. They accordingly obtained from Cresswell a statutory declaration, purporting to be sworn by his client Hugh Cameron before himself, as a Commissioner of the Supreme Court of the Colony for taking affidavits, to the effect that the declarant had never been made insolvent, or taken the benefit of any Act relating to bankruptcy or insolvency. Upon production of that evidence the registrar duly entered a memorial of the mortgage in the folio containing Hugh Cameron's certificate of title.

Mr. Messer returned to the Colony in July, 1886, when these frauds were discovered, and Cresswell absconded, leaving no assets. The present suit was then brought by Mrs. Messer against (1.) the registrar, (2.) the McIntyres, as mortgagees of Hugh Cameron, and (3.) Cresswell. It prays for an order for the calling in and cancellation of the certificates in name of Hugh Cameron, and also for the issue to the plaintiff of new certificates of title, free from the incumbrance of the McIntyres' mortgage; and alternatively, in the event of the mortgage being held to constitute a valid incumbrance upon her title, for a declaration that the plaintiff shall be at liberty to redeem, and that the moneys necessary therefor be paid by the registrar out of the assurance fund created by the Act.

It is clear that the registration of the name of Hugh Cameron, a fictitious and non-existing transferee, cannot impede the right of the true owner Mrs. Messer, who has been thereby defrauded, to have her name restored to the register. Accordingly, in the absence of Cresswell, who has not appeared to defend, the controversy between the litigant parties has been mainly, if not wholly, confined to the question whether the mortgage is or is not an incumbrance affecting Mrs. Messer's title. If the mortgage is valid, their Lordships see no reason to doubt that Mrs. Messer has been deprived of an interest in her land, in consequence of fraud, within the meaning of sect. 144, and that, failing recovery from Cresswell (against whom she has taken all the proceedings which the clause requires), she is entitled to receive the amount payable for its redemption out of the assurance fund. On the other hand, if the mortgage does not constitute an incumbrance upon her title, Mrs. Messer will obtain a full measure of relief, and can have no claim against the fund.

Webb, J., the judge of the first instance, sustained the validity of the mortgage, but ordered that the plaintiff should be at liberty to redeem, and that the defendant, the registrar, should pay to her, out of the assurance fund, her costs of the action, all moneys from time to time paid by her for interest in respect of the mortgage, and also all moneys necessarily paid by her for principal, interest, and costs in order to its redemption. His decision was affirmed on appeal by the Full Court, with the

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variation that the plaintiff was found liable in costs to the mortgagees, to be added to her own costs of suit, and repaid to her by the registrar out of the assurance fund.

The registrar has appealed to this Board from the judgment of the Full Court. In the course of the argument it was maintained, on his behalf, that the protection given by the statute to proprietors of a mere interest in land, such as is created by a statutory mortgage, which does not operate as a transfer of the legal estate, is less extensive than the protection afforded to proprietors of the land itself. Their Lordships do not find it necessary to determine that point, although, primâ facie, it does appear to have been the intention of the Act to confer the same kind and degree of security upon all persons who, transacting in reliance on the register, acquire either proprietary rights or mere interests in land, in good faith and for valuable consideration. They assume, for the purposes of this case, that the statute, in that respect, makes no distinction between these two classes of proprietors; and that the McIntyres' mortgage is not liable to impeachment upon grounds which would have been unavailing against a transfer of the land obtained by them, in similar circumstances, from the same author.

Their Lordships do not propose to criticise in detail the various enactments of the statute relating to the validity of registered rights. The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bonâ fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title. In the present case, if Hugh Cameron had been a real person whose name was fraudulently registered by Cresswell, his certificates of title, so long as he remained undivested by the issue of new certificates to a bonâ fide transferee, would have been liable to cancellation at the

instance of Mrs. Messer; but a mortgage executed by Cameron himself, in the knowledge of Cresswell's fraud, would have constituted a valid incumbrance in favour of a bonâ fide mortgagee. The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration.

The difficulty which the mortgagees in this case have to encounter arises from the circumstance that Hugh Cameron was, as Mr. Justice Webb aptly describes him, a "myth." His was the only name on the register, and, having no existence, he could neither execute a transfer nor a mortgage. The mortgagees have endeavoured to surmount that difficulty by arguing that, in the circumstances of the case, Cresswell must be held to have been de jure, if not de facto, the proprietor whose name was on the register, and that their mortgage, executed by him in the name of Hugh Cameron, is, therefore, as valid as if Cresswell's own name had been on the register, and he, and not Cameron, had been the apparent mortgagor. That argument found favour with both Courts below.

The views entertained by the learned Judges have been very clearly explained by Mr. Justice A'Beckett, who, in delivering the judgment of the full bench, said:—"We, therefore, feel no doubt that the certificate of title on which the mortgagees advanced their money, though brought into existence by the forgery of the defendant Cresswell, was as efficacious in their favour as if it had issued upon an honest and regular transaction. That certificate described Hugh Cameron as the proprietor, and the mortgagees had the right to rely upon the certificate as evidence of his title to an indefeasible estate in the land mortgaged to them. It now appears that no such person as Mr. Hugh Cameron described in the certificate in fact existed; and the appellants

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contend that a mortgage purporting to be by this fictitious person, and affecting land alleged to be his, is a mortgage of a non-existent interest—a mere abstraction which cannot derogate from the rights of the true owner—and that the mortgage is therefore worthless. This contention appears to us to be answered by the view put forward in the statement of claim inferentially admitted by the Registrar of Titles, and sustained by the evidence, that Charles James Cresswell had, for the purpose of dealing with this land, assumed the name of Hugh Cameron. It was he who signed the transfer to Hugh Cameron as transferee, and who signed the mortgage to the Defendants McIntyre as mortgagor, and he produced the certificate of title of Hugh Cameron for the purpose of having the mortgage registered upon it. Upon these facts we think that, in favour of the mortgagees, he should be regarded as the proprietor of the land with whom they dealt, on the faith of the certificate evidencing his title."

The opinion thus expressed appears to recognise the principle that a mortgagee, advancing his money on the faith of the register, cannot get a good security for himself except by transacting with the person who, according to the register, is the proprietor having title to create the incumbrance. So far their Lordships agree; but they do not concur in the inferences which the learned judges have drawn from the facts in evidence, with respect to the position of Cresswell throughout these transactions, and his true relation to the name entered on the register as that of the proprietor. They are unable, upon the facts proved, to affirm that Cresswell "assumed" the name of Hugh Cameron for the purpose of dealing with Mrs. Messer's land. A man cannot, with any propriety, be said to assume a name, or in other words an alias, unless he acts personally under that name, or asserts it to be his own designation. Nothing could be farther from Cresswell's purpose than his assumption of the name of Hugh Cameron; on the contrary, the mainspring of his fraudulent device consisted in representing Hugh Cameron to be a real person, a grazier, who had no connection with himself beyond that of an ordinary client. In pursuance of that device he professed to transact with the McIntyres in the capacity of

Cameron's law agent, he attested what purported to be Cameron's signature to their deed of mortgage, and he gave them a document, used by them in order to obtain registration of their right, which bore that Hugh Cameron had appeared personally before him, and had signed the document in his presence, after making oath to the verity of its contents. The McIntyres must, in these circumstances, have understood Cresswell and Hugh Cameron to be distinct individualities. They nowhere allege the contrary; and if they had even suspected that Hugh Cameron was only another name for Cresswell, they would not have been justified in completing the transaction without inquiry. The McIntyres cannot, therefore, as matter of fact, be held to have dealt on the faith of the certificate as evidencing the proprietary title of Cresswell.

The truth is that Hugh Cameron was in no sense an alias of Cresswell's, but a fiction or puppet created by him, in order that it might appear to be an individual having a separate and independent existence. The reasoning of the learned Judges fails to appreciate the difference between these two things. If Cresswell had, as they say he did, "assumed" the name of Hugh Cameron, and had used it fraudulently, he would not have been a forger. His fraud, in that case, would have lain in the representation that Hugh Cameron was his own designation, and he would, no doubt, have been amenable to the criminal law, in respect of such fraud. But, in first registering a fictitious Hugh Cameron as proprietor of the land, and then executing and delivering a mortgage in the name of Hugh Cameron, Cresswell represented the mortgagor to be a person other than himself, and committed the crime of forgery. The real character of the criminal acts perpetrated by Cresswell differs in no respect from what it would have been, had Hugh Cameron been a real person, whose name was put upon the register by him, and used by him in a forged deed creating an incumbrance.

Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title, in a bonâ fide purchaser by force of the statute, there is no enactment which makes indefeasible the

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registered right of the transferee or mortgagee under a null deed. The McIntyres cannot bring themselves within the protection of the statute, because the mortgage which they put upon the register is a nullity. The result is unfortunate, but it is due to their having dealt, not with a registered proprietor, but with an agent and forger, whose name was not on the register, in reliance upon his honesty. In the opinion of their Lordships, the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences.

Their Lordships will humbly advise Her Majesty to reverse both judgments below, and, in lieu thereof, (1) to declare that the mortgage purporting to be executed by Hugh Cameron to the Defendants McIntyre is invalid, and does not constitute an incumbrance upon the title of the Plaintiff Mrs. Messer; (2) to direct the Defendant Richard Gibbs to cancel the two certificates of title issued in the name of Hugh Cameron and entered in folios 346,585 and 346,586 of the register book, vol. 1,733, and also the memorial of the said mortgage entered in these folios, and to substitute therefor two certificates of title, to the same lands respectively, in the name of the Plaintiff; (3) to order the Defendants McIntyre to pay to the Plaintiff her costs of suit in both Courts below; (4) to order the Defendant Charles James Cresswell to pay to the Defendant Richard Gibbs his costs in those Courts, and here, and also to pay to the Defendants McIntyre all such costs, either incurred by them, or paid by them to the Plaintiff as hereby provided. The Defendants McIntyre must pay to the Plaintiff Mrs. Messer her costs of this appeal.

Solicitors for Appellant: *Freshfields & Williams.*
Solicitors for Respondent Messer: *St. Barbe, Sladen, & Wing.*
Solicitors for Respondents McIntyre: *Watson & Malleson.*

[PRIVY COUNCIL.]

THE OWNERS OF S.S. "PLEIADES" AND EDWARD PAGE (MASTER) . . } DEFENDANTS;

AND

JOSEPH PAGE (MASTER) AND OWNERS OF S.S. "JANE" AND LESSER . . } PLAINTIFFS.

J. C.* 1891 Feb. 3, 14.

ON APPEAL FROM THE VICE-ADMIRALTY COURT AT GIBRALTAR.

Collision—Practice—Issue as to Contributory Fault must be first raised in the Lower Court.

Where in a case of collision no suggestion has been made in the pleadings and evidence by either party that in the event of their vessel being found to be in the wrong, there was contributory fault on the part of the other vessel:—

Held, that the vessel shewn to have been at fault by reason of her failure to keep out of the way could not be allowed to raise the question for the first time in the final Court of Appeal whether the other vessel was not also in fault from failure to comply with art. 18 of the Regulations.

The Tasmania (15 App. Cas. 223) followed.

APPEAL from a decree of the Judge of the Vice-Admiralty Court (Oct. 7, 1889) in consolidated actions brought by the respondents against the appellants, and by the appellants against the respondents, for damages arising out of a collision between the respondents' vessel the *Jane* and the appellants' vessel the *Pleiades*, which occurred off Europa Point, Gibraltar, on the 3rd of August, 1889.

There were in all three actions. Those by the appellant, the master of the *Pleiades*, against the *Jane* and her freight, and by the respondent, the master of the *Jane*, against the *Pleiades* and her freight, were consolidated by an order of Court.

Subsequently, by consent, an action brought by the respondent Lesser, the owner of the cargo of the *Jane*, against the *Pleiades* and freight, was consolidated with the two other actions.

The judge found the *Pleiades* solely to blame for the collision,

* *Present*:—LORD WATSON, LORD MORRIS, and SIR RICHARD COUCH.

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and condemned her in damages and costs, subject to a reference to the Registrar and merchants.

Myburgh, Q.C., and *Raikes*, for the appellants, contended that the collision was wholly caused by the *Jane*. She was improperly and negligently navigated, altered her course improperly and without necessity, and in violation of art. 22 of the Regulations, and of good seamanship. She also violated art. 18, by failing to reverse her engines, and was proceeding at full speed at the time of the collision. At the least there was, in this latter respect especially, contributory negligence or fault on the part of the *Jane*. [LORD WATSON referred to *The Tasmania* (1).] [Reference was made to *The Beryl* (2); *The Memnon* (3); *The James* (4).]

Sir *Walter Phillimore*, Q.C., and *Aspinall*, for the respondents Page and the owner of the *Jane*, were not heard.

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The judgment of their Lordships was delivered by

LORD WATSON:—

This is an appeal by the owners and master of the steamship *Pleiades* from a judgment of the Vice-Admiralty Court of Gibraltar, in three consolidated suits, arising out of a collision between their vessel and the steamship *Jane*. Two of these are cross-actions of damage by the respective masters, and the third an action by the owner of the *Jane's* cargo against the *Pleiades* and freight. The learned judge of the Vice-Admiralty Court found that the *Pleiades* alone was to blame for the disaster; and he has disposed of each action in accordance with that finding.

The collision occurred between 4.30 and 5 P.M. on the 3rd of August, 1889, in broad daylight and in calm, fine weather, about a quarter of a mile to the southward of Europa Point Lighthouse. The vessels appear to have first sighted each other when they were from three to four miles apart. The *Pleiades* was then entering the Mediterranean on an E. ½ N. course, at a speed of 10 knots per hour. The *Jane* was making for the port of

(1) 15 App. Cas. 223.
(2) 9 P. D. 137.
(3) 6 Asp. Mar. Law Cas. p. 488.
(4) 10 Moo. P. C. 162.

Gibraltar, on a crossing course N.W. by W., at the rate of 7½ knots. Each vessel kept its course without alteration of speed, until they came within 400 or 500 yards of each other. So far there is no material discrepancy between the accounts given by the witnesses on either side; but there is some conflict of evidence as to subsequent events. On reaching the point already indicated, the *Pleiades* ported her helm, which carried her half a point to starboard before actual collision, and signalled the manœuvre by two blasts of her whistle; whilst the *Jane* ported, with the effect (due apparently to her having no keel) of bringing her head five points to starboard at the time of collision. When she altered her helm, the *Pleiades* first stopped and shortly after reversed her engines; but there must have been considerable way upon her at the moment of collision, because her master states "it would take nine or ten minutes to stop way from full speed ahead." When the *Jane* ported, she first stopped and then went full speed ahead. The collision took place in a very short time, apparently not more than from one to two minutes after the first change of helm, the stem of the *Pleiades* striking the port side of the *Jane* nearly at right angles, abaft her main rigging.

The witnesses differ as to the sequence of these events. Those of the *Pleiades* assert that her change of helm was not made until the *Jane* had ported, and that it was necessitated by the action of the *Jane*. Those examined for the *Jane* state that she altered her course after, and in consequence of the *Pleiades* having intimated that she was starboarding. The learned judge of the Court below, before whom all the principal witnesses were examined, gave credit to the version told by the witnesses from the *Jane*, and their Lordships see no reason to differ from his conclusion.

The only case made by the appellants in their pleadings and in their evidence was, that both ships ought to have maintained their original courses, with unaltered speed, in which case there would have been no risk of collision, and that the collision which ensued was entirely owing to the *Jane's* departure from her original course. In their preliminary act, they state that "the collision was caused through the steamship *Jane* not keeping her course: arts. 16 and 22." The case presented

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on the other side was that the *Pleiades* occasioned the collision by failing to observe art. 16, and keep out of the way of the *Jane*; that the *Jane* ported because the starboarding of the *Pleiades* indicated that she had determined to disobey the rule inculcated by art. 16; and that the result of her disobedience was to render collision inevitable. It was not suggested by either party that, in the event of their vessel being found to have been in the wrong, there was contributory fault on the part of the other vessel, which would imply joint responsibility.

Their Lordships have no hesitation in holding that the decision of the Vice-Admiralty Court upon the issues submitted to it was fully justified by the evidence. They have, with the assistance of their assessors, formed a clear opinion (1.) that, if both vessels had continued on their original courses, with unabated speed, to the point of intersection of these courses, there would have been imminent danger of collision; (2.) that the attempt of the *Pleiades* to pursue her original course was in plain violation of the 16th article of the Regulations; and that, having regard to the proximity of Europa Point on the one hand and the abundance of sea-room on the other, an endeavour to pass ahead of the *Jane* was an improper and unseamanlike manœuvre; and (3.) that up to the time when she starboarded the *Pleiades* could, by porting and directing her course to starboard, have complied with the Regulations, and passed astern of the *Jane* without involving risk of collision.

On the argument of this appeal, counsel for the *Pleiades* maintained for the first time that, assuming her to have been culpable by reason of her failure to keep out of the way, the *Jane* was also in fault, and ought to be jointly condemned in damages, in consequence of her failure to comply with the 18th article of the Regulations. If the argument were admissible at this stage of the proceedings, it would raise the very serious question whether the *Jane* was justified in steaming ahead instead of reversing when it became apparent that a collision was unavoidable; and the onus of shewing that her action was justifiable would undoubtedly rest upon the *Jane*. Upon the merits of the argument, their Lordships purposely

refrain from expressing any opinion in the present condition of the evidence. They did not call upon the respondents' counsel for a reply, because they were satisfied, upon the appellants' own shewing, that they ought not to entertain the question. The point was not taken in the Court below, where no reference was made to the 18th article either in the preliminary acts, the pleadings, the evidence, or in the argument. The evidence upon which the contention is now based was elicited from the witnesses in loose and general terms, not for the purpose of ascertaining the precise state of the facts, but simply by way of narrative. The master of the *Jane* was asked on cross-examination why he ported his helm; but not a single question was put to any of the *Jane's* witnesses in regard to her going ahead instead of reversing. In these circumstances, their Lordships are not satisfied that they have before them—to use the language of Lord Herschell in *The Tasmania* (1)—"all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box."

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment appealed from. The appellants must pay to the respondents, who have appeared, their costs of this appeal.

Solicitors for appellants: *Waltons, Johnson, & Bubb.*
Solicitors for respondents: *Thomas Cooper & Co.*

(1) 15 App. Cas. 225.

[PRIVY COUNCIL]

J. C.* 1891 Feb. 19, 20.

DE MESTRE AND ANOTHER . . . . . PLAINTIFFS;

AND

WEST AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Marriage Settlement—Limitation in favour of Volunteers—Subsequent Conveyance by Settlor.

A limitation in a marriage settlement in favour of the settlor's illegitimate child and his issue, not being within the marriage consideration, may be defeated by a subsequent conveyance by the settlor to a purchaser for value; unless such result would involve the defeat of other limitations within the marriage consideration. Special agreement between the parties thereto in favour of the limitation, acceptance by one of the parties of different interests in the settled property from those which the law would have given, omission to provide therein for all or some of the issue of the marriage, are insufficient to support such limitation against a purchaser for value.

Mackie v. *Herbertson* (9 App. Cas. 303) approved.

Clarke v. *Wright* (6 H. & N. 849) dissented from.

Newstead v. *Searles* (1 Atk. 264), and *Clayton* v. *Lord Wilton* (6 M. & S. 67) explained.

APPEAL from a decree of the Supreme Court (March 11, 1889).

The appellants' statement of claim, which was dated the 29th of March, 1888, claimed in substance that the trusts of a certain settlement of the 16th of March, 1838, might be declared and established, and that the appellant, Mrs. De Mestre, might be declared, after the death of the respondent Harriet Sherwin, to one-fifth of certain lands comprised in the settlement. The question between the parties was whether George Taylor Rowe (the father of Mrs. De Mestre) was within the consideration for the settlement, or whether (as the Court below decided) the settlement was a voluntary one as regards the interest taken by him under the settlement.

* *Present*:—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, and LORD FIELD.

The settlement in question had been lost. But the Court held it as proved to have been made, on the marriage of Harriet Sherwin with Thomas Deane Rowe, between William Henry Moore of the first part; Harriet Sherwin, then Harriet Hanks, of the second part; Thomas Deane Rowe of the third part; and W. W. T. Dowling of the fourth part. Thereby two parcels of land in New South Wales, the property of Harriet Hanks, were settled after the marriage to the use of herself for life, then to the use of T. D. Rowe for life, and after the death of the survivor of them to the use of the said George Taylor Rowe, their illegitimate son, for life, and after his death to the use of all the children of the said George Taylor Rowe as tenants in common in fee. The two parcels of land had been granted in fee simple to Harriet Hanks by the Government in 1831, conditionally on payment of certain yearly quit rents, and on the erection by her or her heirs and assigns of permanent dwelling-houses, stores, or other suitable buildings, and on the construction of drains, and on conforming to the Government regulations for the time being.

At the date of the settlement George Taylor Rowe was unmarried, and an infant fifteen years old. The marriage took place on the 17th of March, 1838; Thomas Deane Rowe died on the 20th of November, 1838; Harriet Rowe married William Sherwin (since deceased) in 1839. George Taylor Rowe died in 1859, having in 1847 married the appellant Phœbe Rowe, and having had six children, viz., the appellant Mrs. De Mestre, two who died intestate and whose interests were represented by their mother, and three who assigned their interests to the respondent Harriet Sherwin.

In 1848 Mr. and Mrs. Sherwin and George Taylor Rowe mortgaged the said two pieces of land to Mrs. West, the mother of the respondent West; and in 1853 the same parties executed a second conveyance of the same property for the purpose of barring and defeating every estate tail at law or in equity of the conveying parties.

In 1869 Mrs. West executed a voluntary conveyance of the said lands to a trustee for the respondent John West.

To the appellants' statement of claim the respondent Harriet

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Sherwin put in no defence. But the respondent John West pleaded that if the settlement of 1838 was made as alleged, it was a voluntary deed liable to be defeated by subsequent sales for value, and submitted that his mother was a purchaser for value without notice of the settlement or of the equities of the appellants thereunder.

The primary judge in equity dismissed the appellants' suit with costs, on the ground that the ultimate remainder after the life of the said George Taylor Rowe in favour of his unborn children was voluntary, and as such had been avoided by the conveyance for value to Mrs. West.

Sir *Horace Davey*, Q.C., and *Alexander Young*, for the appellants, contended that the remainder in the above settlement contained in favour of the children of George Taylor Rowe was not voluntary. It was for valuable consideration as being part of the marriage contract. Also as being a limitation of property held under onerous conditions as to which liability was and is attached; the performance of those conditions by the said children being a sufficient consideration to support the limitation in their favour. The settlement, which comprised other property than that claimed by West, should at least be established as against the respondent Harriet Sherwin. George Taylor Rowe and his issue were under the circumstances of the case within its consideration. Reference was made to *Dickenson* v. *Wright* (1); *Clarke* v. *Wright* (2); *Cormick* v. *Trapaud* (3); *Newstead* v. *Searles* (4); *Clayton* v. *Lord Wilton* (5); *Mackie* v. *Herbertson* (6); *Jenkins* v. *Keymis* (7); *In re Cameron and Wells* (8); *Dart's* Vendors and Purchasers, 6th ed. p. 1012. And on the subject of onerous conditions, see *Price* v. *Jenkins* (9).

Rigby, Q.C., and *O'Clare*, for the respondent West, contended that the decision of the primary judge was right. The appellants and those whom they represented, were volunteers and not

(1) 5 H. & N. 401.
(2) 6 H. & N. 849.
(3) 6 Dow, 60.
(4) 1 Atk. 264.
(5) 6 M. & S. 67; S.C. 3 Madd. 302.
(6) 9 App. Cas. 337.
(7) 1 Lev. 150, 237.
(8) 37 Ch. D. 32.
(9) 4 Ch. D. 483; S.C. 5 Ch. D. 619.

within the consideration or contract for or by reason of which the marriage settlement of 1838 was executed. Mrs. West, the mother of the respondent, was a subsequent purchaser for valuable consideration, and the settlement was void as against her so far as regarded the limitation therein in favour of the children of G. T. Rowe. Reference was made to *Johnson* v. *Legard* (1); *Sutton* v. *Chetwynd* (2); *In re Cameron and Wells* (3).

Arthur Young, for Mrs. Sherwin and De Mestre.

Alexander Young, replied.

The judgment of their Lordships was delivered by

EARL SELBORNE:—

Their Lordships have considered the arguments addressed to them in this case, and they have come to the conclusion that it will be their duty to advise Her Majesty to affirm the judgment appealed from.

It is unnecessary to go into the history of the law upon this subject. The general rule has long been settled, that a voluntary conveyance, even though from the most honest motives and the most moral considerations, may be defeated, according to the construction which has been placed upon the statute of 27 Eliz. c. 4, by a subsequent conveyance to a purchaser for value such as was made in this case. It has also been determined in a manner which it would be too late now to attempt to review—in the case, amongst others, of *Sutton* v. *Chetwynd* (2); and in the Irish case of *Cormick* v. *Trapaud* (4), both decided by the House of Lords—that this rule is applicable to limitations in favour of volunteers under marriage settlements. Therefore, as the law is so settled, some special reason, consistent with that law, must be shewn for taking any particular case out of the rule. Whether their Lordships would have established such a rule had the matter been new is not the question.

The case which has been mainly relied upon as an authority

(1) 3 Madd. 283; S.C. T. & R. 281; S.C. 6 M. & S. 60.
(2) 3 Mer. 249.
(3) 37 Ch. D. 32.
(4) 6 Dow, 60.

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for allowing this appeal is one in the Court of Exchequer, of *Dickenson* v. *Wright* (1), which was affirmed in the Court of Exchequer Chamber under the title of *Clarke* v. *Wright* (2). Their Lordships probably would agree that, if that case ought to be followed, it might be an authority in support of the present appeal. But they observe not only that Lord St. Leonards, in editions of his book on Vendors and Purchasers, later than *Clarke* v. *Wright* (2), but subsequent judges—Vice-Chancellor Hall, a great judge in this branch of the law especially, and the present Lord Justice Kay—have unfavourably criticised that decision. And, when the reasons given for that decision and the state of opinion apparent from the report of what took place in the Court of Exchequer Chamber come to be examined, it seems to their Lordships impossible that it can be supported. In the Court of Exchequer, where the judgment was given by Baron Channell, it is apparent that the Court proceeded upon the view that the case of *Newstead* v. *Searles* (3) was an authority for the proposition that a settlement, by a widow about to marry, upon her children by a former marriage is good against a subsequent mortgagee, putting it in that general way, without any reference to any more special reasons. And no doubt, if that had been so, it would have been difficult to resist the conclusion drawn by the Court of Exchequer, that by parity of reasoning the same rule would apply in favour of an illegitimate child. *Clayton* v. *Lord Wilton* (4) was also referred to by the same learned judge as having determined that a limitation in a marriage settlement to the children of a possible second marriage is good, without reference to special circumstances. Unless the view so taken of those previous authorities of *Newstead* v. *Searles* (3) and *Clayton* v. *Lord Wilton* (4) was correct, the foundation of that judgment fails.

In the Court of Exchequer Chamber their Lordships find a very great conflict of opinion among the judges, and plainly the majority of the judges would have been for reversing the judgment below if they had not taken the same view of *Newstead* v. *Searles* (3), and *Clayton* v. *Lord Wilton* (4), which was taken

(1) 5 H. & N. 401.
(2) 6 H. & N. 849.
(3) 1 Atk. 264.
(4) 6 M. & S. 67.

by Channell, B. No doubt two very learned judges in that Court, Blackburn, J., and Willes, J., put the case upon a different ground, and endeavoured to explain in a different way the decisions in *Newstead* v. *Searles* (1), and *Clayton* v. *Lord Wilton* (2); the ground taken by them being apparently this, that if it can be inferred from circumstances that the parties had specially in view, when they made their agreement, provision to be made for persons who would otherwise have been volunteers, they were no longer volunteers, because it was a matter of special bargain, although there might be no other valuable consideration for that agreement than the marriage. In other words, that, although *primâ facie* provisions in favour of collaterals in marriage settlements were not within the marriage consideration, yet they might always be brought within it if the parties so intended. No other authority was cited in favour of that proposition; and, if sound, it would go far to destroy the general rule; for it is recited in almost every marriage settlement that all the provisions made by it, whether for the parties themselves and the issue of the marriage, or for anyone else, are made pursuant to agreement. And if, as Blackburn, J., appears to have thought, the acceptance by a husband of interests in his wife's property, different from those which the law would have given him if there had been a marriage without any settlement, would be a sufficient consideration to support limitations to collaterals against a purchaser for value, this, or something equivalent, may be said to occur in every case in which any property of the wife is brought into settlement. Nor do their Lordships think that the omission to provide in a marriage settlement for all or some of the issue of the marriage can operate as a consideration in favour of persons provided for by it who would otherwise be volunteers. The majority of the judges, in *Clarke* v. *Wright* (3), differed from Blackburn, J. on these points; and if *Newstead* v. *Searles* (1), and *Clayton* v. *Lord Wilton* (2), had been understood as their Lordships understand those cases, *Clarke* v. *Wright* (3) would not have been decided as it was.

Under those circumstances it appears to their Lordships to be

(1) 1 Atk. 264. (2) 6 M. & S. 67.
(3) 6 H. & N. 849.

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their duty to advise Her Majesty, in accordance with the view which they themselves take of *Newstead* v. *Searles* (1), and *Clayton* v. *Lord Wilton* (2), and which was taken by the House of Lords in *Mackie* v. *Herbertson.* (3) The order of the limitations in both those cases was such, that the limitations which were not within the marriage consideration were covered by those which were, so that those which were within the marriage consideration could not take effect in the form and manner provided by the instrument without also giving effect to the others. It was on that ground, and not from any special favour to provisions for the benefit of children who were not issue of the marriage, that their Lordships consider both those cases to have been determined. If similar circumstances should occur in any other case, it may be inferred from what was said in the House of Lords in *Mackie* v. *Herbertson* (3), that the same principle would be applied; and indeed the principle seems to be clear; for the settlement in any such case could not be defeated without defeating the interests of children unquestionably within the consideration of marriage. There is no authority for the proposition that under the statute a particular limitation can be picked out of the middle of a settlement, or the shares of some persons who would take *pari passu* with others according to the terms of the settlement picked out, in order to be destroyed, in favour of a subsequent purchaser; leaving subsequent or concurrent interests of persons who were within the consideration of marriage under the same settlement undisturbed.

The only question in their Lordships' view which remains is, whether in this case there are special circumstances which bring it within the principle of *Newstead* v. *Searles* (1), and *Clayton* v. *Lord Wilton* (2), so understood. The property settled was that of the wife only. No consideration, except that of marriage, proceeded from the husband. There is an ultimate limitation of the property which the wife is herself settling to her heirs, subject to a general power of appointment, not in favour of any particular persons within the marriage consideration, but in those general forms in which it may be said that in almost all

(1) 1 Atk. 264. (2) 6 M. & S. 67.
(3) 9 App. Cas. 303.

settlements the ultimate undisposed of and unsettled interest is reserved back to the settlor, or subject to the appointment of the settlor. It seems to their Lordships impossible to hold, that this is enough to bring a case within the principle of *Newstead* v. *Searles*. (1) Then does the interposed provision about raising money for the benefit of the illegitimate son of the wife during the lifetime of the husband and wife, or either of them, make any difference? However that provision ought to be construed, it was only a power to raise a sum not exceeding a certain amount, during a certain period of time, which is not alleged to have been, and which their Lordships must assume not to have been, executed. Their Lordships do not think it necessary to determine whether Mr. George Taylor Rowe, the illegitimate son, could have insisted on the exercise of that power, if he had claimed to have it executed in his favour, or not. He is dead, and the question is not with him; but it is with those who come last in the order of the settlement—his issue. It was not for them that this money was to have been raised, if it had been raised at all. No doubt if it had been raised they would have had an ultimate interest in it under the settlement; but in the present suit no claim is made on the footing that it ought to have been raised. Their Lordships, think, therefore that there are not in this settlement any special provisions sufficient to bring it within *Newstead* v. *Searles* (1); and that the Court below was right in holding the case to fall within the general rule. The appeal must therefore be dismissed, and their Lordships will so advise Her Majesty. The appellants will pay to the respondent West his costs of this appeal.

Solicitors for the appellants: *Walker, Martineau & Co.*

Solicitors for the respondent West: *Burton, Yeates, Hart, & Burton.*

Solicitors for the respondents: *Sherwin & De Mestre*; *Walker, Martineau & Co.*

(1) 1 Atk. 264.

[PRIVY COUNCIL.]

J. C.* 1890 Nov. 13, 14, 19. 1891 March 18.

MUSGROVE . . . . . DEFENDANT;

AND

CHUN TEEONG TOY . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Chinese Act, 1881, *s.* 3—*Aliens—Collector of Customs.*

By sect. 3 of the Victorian Chinese Act, 1881, a Chinese immigrant has no legal right to land in the colony until a sum of £10 has been paid for him.

Where the master of a vessel had committed an offence under the Act by bringing a greater number of Chinese immigrants into a port of the colony than the Act allows:—

Held, that the collector of customs was under no legal obligation to accept payment tendered by the master on behalf of any such immigrants, nor when tendered either by or for any individual immigrant:—

Held, further, that apart from the Act, an alien has not a legal right enforceable by action to enter British territory.

APPEAL from a judgment of the Supreme Court (Nov. 5, 1888).

The question in the appeal was whether the Colonial Government, as representing Her Majesty, had power to prevent the respondent, a Chinese immigrant, from landing on the shores of the colony under the circumstances averred in the appellant's statement of defence, which is recited in their Lordship's judgment.

The facts are stated in the judgment of their Lordships.

By sect. 3 of the Chinese Immigrants Statute, 1865, the word "immigrant" is defined to mean any male adult native of China or its dependencies or of any islands in the Chinese seas, not born of British parents, or any person born of Chinese parents.

By sect. 2 of the Chinese Act, 1881, it was provided that if any vessel which had on board a greater number of immigrants

* *Present*:—THE LORD CHANCELLOR, LORD HOBHOUSE, LORD HERSCHELL, LORD MACNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

than in the proportion of one such immigrant to every hundred tons of the tonnage of such vessel, should arrive at any time in any port in Victoria, the owner, master, or charterer of such vessel should be liable on conviction to a penalty of £100 for each immigrant so carried in excess of the foregoing limitation.

By sect. 3 of the same Act it was enacted that before any immigrant arriving from parts beyond Victoria shall be permitted to land from any vessel at any port or place in Victoria, and before making any entry at the customs, the master of the vessel by which such immigrant shall so arrive shall pay to the collector or other principal officer of customs the sum of £10 for every such immigrant, and that no entry shall be deemed to have any legal effect until such payment shall have been made, and such immigrant for whom such sum has been paid shall receive from the said collector or other principal officer a certificate to that effect. The "entry" referred to in this section is the report, which, by the 40th section of the Customs Act, 1857 (Act No. 13), the master of every vessel is required to make before bulk is broken.

The respondent, in his statement of claim, alleged that he arrived in the port of Melbourne on the 27th of April, 1888, on board the British ship *Afghan*, and that the master of that vessel, in respect of the plaintiff, offered to pay, and was always ready and willing to pay, to the appellant as collector of customs the sum of £10, as provided by sect. 3 of the Chinese Act of 1881, but the appellant refused to receive the said £10, or to allow the respondent to land in Victoria.

In his defence the appellant admitted the allegations in the statement of claim, except as to the offer of £10, and his refusal to accept the same. The construction put by the Full Court on the 4th paragraph of the defence was, first, that the appellant pleaded a justification under the orders of a Colonial Minister claiming to exercise an alleged prerogative of the Crown to exclude alien friends; and, secondly, that he denied the right of a court of law to examine his action, on the ground that what he had done was a so-called act of State.

All the judges agreed in holding that the second defence thus raised was not a good one, and that there was no question of an

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act of State. Two of the judges—the Chief Justice and Kerferd, J.—held that the first defence was good. But the other judges—Williams, Holroyd, A'Beckett, and Wrenfordsley, JJ.—agreed in holding it a bad one; and that, therefore, judgment should be entered for the plaintiff. Kerferd, J., besides agreeing with the Chief Justice that the first defence was a good one, thought that there was a third ground of defence, in that plaintiff's action in attempting to enter the colony was to be deemed unlawful. The other members of the Court did not treat this point as raised by the defence. Holroyd, J., was of opinion that the plaintiff had committed no unlawful act.

Sir *Horace Davey*, Q.C., and *Wrixon*, Q.C. (of the Victorian bar), (*Gurner*, with them), for the appellant, contended that the respondent, as an alien, had no right of action against the appellant, as an officer of the Queen, for preventing him from landing in Her Majesty's dominions. The respondent's claim was based on this, that on his arrival the appellant refused to allow him to land or to accept the tax of £10 with respect to him provided by sect. 3 of the Act of 1881. But the appellant was under no legal obligation to accept that amount; and, unless it were accepted, the respondent had no legal right, having regard to the local Acts in force, to land. The appellant acted under instructions from the commissioner of customs, and Her Majesty's responsible minister ratified what was done as an act of State policy; and on that ground no action lay. Further, the master of the ship was guilty of misdemeanour, and subject to a penalty for bringing into port more immigrants than by law he was entitled; and that again justified the refusal to accept £10 in respect of any one of the men so brought.

On the broad constitutional ground, it was contended that Her Majesty by her prerogative had power to prevent any alien from landing in any part of her dominions. The Colonial Government and the Queen's Ministers for Victoria, representing and acting on behalf of Her Majesty, were entitled, in exercise of that prerogative, to prevent an alien from landing in any part of Victoria. It was the duty of the Municipal Court, in an action by an alien, to presume that such act of the local Government

was done by Her Majesty's command, as she had not in any manner disallowed such act. Under the constitution granted to the colony (see the Constitution Act (18 & 19 Vict. c. 55, schedule)), the Government must be deemed to have been invested with power to preserve peace, order, and good government, and generally with functions as regards the colony co-extensive with those of the Imperial Government as regards Great Britain. So far as the exclusion of Chinese from the colony was a local matter, the local minister would advise the exercise of prerogative: if it became a matter of imperial concern, the case would be altered. In this case it was only a matter of local concern, and the Chief Justice was right in construing the Acts of Parliament which conferred the Victorian constitution to mean that they gave to the local minister the power of advising the exercise of prerogative with respect to it. With regard to the mode in which it had been exercised in this case, it was in no way inconsistent with any of the Chinese Immigrant Acts, the effect of which was that it was unlawful for the master of this ship to permit any Chinese immigrant to land, and also unlawful for any such immigrant to enter the colony, notwithstanding the tender of £10. A right to deport aliens is not claimed in this case; it is a right to exclude them which is now in question. Reference was made to *The Rolla* (1); *Buron* v. *Denman* (2), as to the act complained of being an act of State, for which no action lies. As to the Crown's prerogative to prevent the entry of aliens, see Kent's Commentaries, vol. i. p. 37; Phillimore's International Law, vol. iv. pp. 2 and 219; Blackstone's Commentaries, vol. i. p. 338, *et seq.*; Chitty on Prerogative, p. 49; Hansard, vol. xxxiv. p. 1065, per Lord Eldon; p. 1069, per Lord Ellenborough. Reference also was made to the Alien Acts (33 Geo. 3, c. 4, s. 7; 56 Geo. 3, c. 86).

Sir *W. Phillimore*, Q.C., and *J. W. McCarthy*, for the respondent, contended that the act of the appellant, as collector of customs, was not an act of State, and that there was no power to prevent the respondent from landing in the colony of Victoria, and no power to detain him in the manner complained of. Even if there

(1) 6 Rob. Adm. 364.

(2) 2 Exch. 167.

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were such power, it did not reside in those officials under whose approval the appellant justified. It was conceded on behalf of the respondent—(a) that every state may by international law exclude aliens; (b) the Victorian parliament may pass any Act for excluding aliens, which the Queen does not disallow; (c) the governor may exercise, on the advice of his ministers, such prerogatives of the Crown as pass to him; (d) the ministers, as statutory officers, may exercise any power conferred by statute, local or imperial. But these points were contended for—(a) that the Crown had no prerogative right to exclude aliens by constitutional law; (b) if it has such prerogative, it has not been delegated to the colonial governor: see *Cameron* v. *Kyte* (1); (c) the act done in this case was neither commanded nor ratified by the governor or Queen, and therefore was not an act of State; (d) an alien friend may bring an action in any case in which a subject can [THE LORD CHANCELLOR:—I shall certainly require authority for that proposition], and may complain of any act of a government officer not being an act of war; (e) the respondent was not excluded by the Chinese Immigrant Acts, and there was a duty on the collector towards him to accept the £10 when tendered or to permit him to land.

It was further contended that the detention on board ship gave a cause of action, and also the refusal to accept the £10. The plea of the appellant was bad. It ought to have averred that the permissible number of fourteen Chinamen had landed, and that the appellant, as fifteenth or some other number, was attempting unlawfully so to do. Further, though there were more men on board than the master could lawfully bring into port, it did not follow that they were immigrants unless it was shewn that they had come with the intention of landing.

With regard to alien friends, it was contended that they had as much right to land in, reside in, and leave the country, as an English subject had. That matter had been debated in Parliament: on one side were Lord Eldon and Lord Ellenborough (Hansard, vol. xxxiv. cols. 1065 and 1069), and on the other Sir Samuel Romilly (Hansard, vol. xxxiv. p. 445), Sir J. Mackintosh (p. 467),

(1) 3 Knapp, 332.

Mr. Denman (Hansard, vol. vii. (N.S.) p. 1723), and for Mr. Hobhouse's opinion see Hansard, vol. vii. (N.S.) p. 1434. The two first named said that the Crown had the right to deport: see *Calvin's Case* (1). It is never possible by prerogative, and apart from statute, to prohibit landing or to send away. Reference was made to *Routledge* v. *Low* (2), where it was said that an alien friend may hold all kinds of property and bring all kinds of actions, even though resident abroad: see Bacon's Abridgment, tit. Aliens, p. 180. Could a man with these rights be prevented by prerogative from landing? See *In re Adam* (3); Sir J. Arnould's Life of Lord Denman, vol. i. p. 220; Memoirs of Sir S. Romilly, vol. iii. p. 258; Blackstone, vol. i. p. 338; Chitty's Prerogative, vol. i. p. 48. The respondent's right to land vested in him as soon as he was on board a British ship within British waters, by the constitution of this country, there being no Act of Parliament to prevent it, and a long consent in favour of it. [LORD HERSCHELL:—But by international law this country has a right to keep the alien out.] For the extent to which the rights of aliens are affected by Acts and proclamations, see 33 Geo. 3, c. 4, s. 7; Proclamation in London Gazette, the 23rd of March, 1796 (p. 301); 27 Edw. 3, stat. 2, c. 2; 1 Rich. 3, c. 9, s. 9; *King* v. *Symons* (4); Forsyth's Cases of Const. Law, pp. 35, 181, 369; Phill. Int. Law, vol. iv. pp. 2 and 3; *Cameron* v. *Kyte* (5); *Musgrave* v. *Pulido* (6); Stephen's Hist. Criminal Law, vol. ii. p. 61, as to act of State. *Conway* v. *Gray* (7); *Barry* v. *Arnaud* (8), as to collector not accepting the £10.

Even assuming the existence of the prerogative, could it be exercised by the colonial governor or his ministers. For a great many purposes the colonial ministers were ministers of the Queen, but not for all; never where the British ministers would be entitled to advise the Crown. The act of the governor must be shewn to be within the terms of his commission, which was necessarily restricted, and the ministers of the governor could not be in a better position than himself.

(1) 7th Co. Rep. pp. 5, 6, 15 b., 16.
(2) Law Rep. 3 H. L. 119.
(3) 1 Moo. P. C. 460.
(4) 2 Strange's Notes of Cases (Madras), p. 93.
(5) 3 Knapp, 332.
(6) 5 App. Cas. 109.
(7) 10 East, 536.
(8) 10 A. & E. 646.

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Wrixon, Q.C., in reply:—

He submitted that the construction of the Constitution Act adopted by the Chief Justice was right, and that the majority of the Court was wrong. By that Act a system of government was established in the colony which carried with it the right and duty on the part of the executive to do all acts that might be necessary or expedient for the security, safety, and welfare of the colony. It could not be, as contended by one of the judges, that the colony was without the legal means of preventing the refuse of alien nationalities from landing on its territory whenever they pleased. It was admitted on the pleas that the act complained of was done by the Queen's government. It was, therefore, not open to a foreigner to complain of that act in a municipal Court. As to the prerogative right to exclude, there was, no doubt, a conflict of authorities. Possibly the authorities cited were dealing with the case of aliens who had already entered the country, and had acquired a certain claim to protection. Where an alien was amongst us, and had acquired a certain status, there was no prerogative to turn him out. This was a case where the law distinctly said he was not to land. Under the Constitution Act, powers of legislation were given, and an executive appointed, to carry out the law. Necessary prerogative for local purposes was given to the local government. The act complained of was an act of State not to be questioned in Court, which should have inferred a ratification by Her Majesty.

1891 *March* 18.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

This is an appeal from a judgment of the Supreme Court of Victoria in favour of the respondent, a Chinese immigrant, the plaintiff in an action against the collector of customs at Victoria, who was the defendant in the action, and is now the appellant.

By an order made in the action by consent, the action was to be determined by the decision of the full Court on the argument of the questions of law raised in the pleadings.

The question having been argued, the majority of the Court gave judgment in favour of the plaintiff,

By a further proceeding in the action the damages were assessed at £150, and from that judgment the present appeal was brought.

It is necessary first to ascertain what question is raised by the pleadings, and upon what state of admitted facts the question so raised is to be determined.

The statement of claim sets out that the defendant was the collector of customs within the meaning of the Chinese Act, 1881, alleges the arrival in Hobson's Bay of the plaintiff on board a British ship, *Afghan*; and in the fourth paragraph, that the master of the ship *Afghan* "offered to pay, and was always ready and willing to pay, to the defendant, as such collector of customs as aforesaid, in respect of the plaintiff, the sum of £10 as provided in sect. 3 of the Chinese Act, 1881. Yet the defendant refused to allow the plaintiff to land in Victoria, and hindered and prevented the plaintiff from landing in Victoria, and altogether refused and declined to receive the said sum of £10."

The allegation of the tender of the £10 is somewhat ambiguously worded. It may mean that £10 was tendered separately for the plaintiff, which would seem to be its natural meaning; or it may mean that a gross sum was tendered for all the immigrants on board, including, therefore, the £10 for the plaintiff; but it can make no difference, for reasons to be presently stated, in which sense the allegation is to be understood.

With respect to the concluding allegation that the defendant hindered and prevented the plaintiff from landing, it seems to imply a duty in the collector of customs to receive the £10 under the circumstances stated and described, and to allege as one of the consequences of a breach of that duty, that the plaintiff was thereby prevented and hindered from landing. It certainly does not seem to suggest any other hindering and preventing than that which was involved in the refusal to receive the £10.

The statement of defence was what would have been described under a former system of pleading as a plea in confession and avoidance. And the demurrer admits every material allegation which is necessary for the determination of either of the separate defences which the statement of defence sets up. It states that

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the plaintiff was a subject of the Emperor of China, and owed allegiance to him, and was not a British subject, and that whilst the Acts of the Parliament of Victoria mentioned in the statement of claim were in full force and unrepealed, the plaintiff was a Chinese immigrant within the meaning of the said statutes, and as such immigrant had arrived at the port of Melbourne, in a certain British vessel called the *Afghan*, which vessel had so arrived in the port with 268 Chinese immigrants on board, being 254 more Chinese immigrants than under the statute such vessel might lawfully bring into the port of Melbourne. The record, therefore, discloses these facts—that the plaintiff was an alien Chinese; that he had arrived on board a vessel conveying immigrants exceeding the number which could lawfully be brought into port by that vessel; that the sum of £10 had not been paid to the collector of customs in respect of the plaintiff; and that the master of the vessel had offered to pay, and was always ready and willing to pay that sum. The question is whether, upon these facts, the plaintiff has shewn that there was a breach of duty towards him committed by the defendant, and that a legal right which he possessed has been infringed. Their Lordships will in the first instance consider the questions which have been raised with regard to the construction of the Code of Victorian Statutes, and their bearing upon the present case, although there is a broader question opened by the claim of the plaintiff to which allusion will be made hereafter. It is not open to controversy that, by virtue of the third section of the Chinese Act of 1881, the plaintiff had no legal right to land until the sum of £10 had been paid for him, and the non-payment of that sum would primâ facie be a complete answer to the complaint that he had been hindered and prevented from landing. The plaintiff seeks to get rid of this difficulty by the allegation that he or the master of the vessel on his behalf tendered, and was ready and willing to pay, the £10, and that it was by the refusal of the defendant to receive it that the payment provided for by the statute was not made. But it is obvious that this will not aid him, unless he can establish that there was a legal obligation on the part of the collector to receive the sum, and that, as the refusal to receive it constituted a breach of duty towards him,

his right to maintain the action was thus made good. It appears to have been contended that the true construction of the third section of the Chinese Act, 1881, was that a licence to land was intended to be given to any Chinese immigrant provided that he paid £10 on landing. Their Lordships are wholly unable to concur in any such interpretation of the Code of Statutes regulating the admission of Chinese immigrants into the colony. On the contrary, the manifest object of the code was to prevent an excessive number of Chinese, or what the legislature thought to be an excessive number of Chinese, landing in the colony, and not merely to impose a tax on those who were desirous of entering it. Their Lordships think that a consideration of the several provisions of the Act of 1881, read as they must be together, renders it clear that this was so. The second section of the Act provides that the owner, master, or charterer of a vessel arriving with a greater number of immigrants than is allowed, shall be liable on conviction to a penalty of £100 for each immigrant so carried in excess of the number permitted. The object of this legislation is obvious. It was to prevent the introduction into the colony by means of one vessel of more than the limited number permitted, and not to licence it on payment of a penalty. It is not because the unlawfulness of an Act is visited by a pecuniary penalty that the payment of that penalty makes it lawful.

The third section of the Act was part of the same scheme, and evidently designed with the same view as the second section. It not merely prohibits any Chinese immigrant landing until the sum of £10 has been paid in respect of him, but it enacts that before making any entry at the customs the master of the vessel by which the immigrant arrives shall pay to the collector of customs the sum of £10 "for every such immigrant," and that no entry is to be deemed to have any legal effect until such payment has been made. It is clear, in their Lordships' opinion, that where the master of a vessel has committed an offence by bringing a greater number of Chinese into a port of the colony than the statute allows, he can have no right to require the collector of customs to receive payment in respect of such immigrants, and thus to further the purpose for which the

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unlawful act was committed, and that there can be no legal duty on the part of the collector to receive any payment tendered him in respect of such immigrants. If this be so the case of the plaintiff manifestly fails, for, as has been pointed out, the statute prohibits his landing before the payment of the specified sum, and he could only get rid of this difficulty by shewing that the refusal to receive payment was unlawful. It was urged on behalf of the plaintiff that the payment of £10 provided for is made in each case on behalf of the immigrant, and that whatever may be the position of a master who has brought himself within the penal provisions of the second section of the statute, each immigrant is entitled to require that the collector shall receive the payment made by or for him. Their Lordships are unable to adopt this construction of the statute, or to hold that its effect is to confer any such right as that suggested, where the act of bringing the intending immigrants into port by the vessel is a contravention of the law.

Their Lordships have so far dealt with the case, having in view only the enactments of the legislature of Victoria, and it appears to them manifest that upon the true construction of these enactments no cause of action is disclosed on the record. This is sufficient to determine the appeal against the plaintiff, but their Lordships would observe that the facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native, but it is quite another thing to assert that an alien excluded from any part of Her Majesty's dominions by the executive government there, can maintain an action in a British Court, and raise such questions as were argued before their Lordships on the present appeal—whether the proper officer for giving or refusing access to the country has been duly authorized by his own colonial government, whether the colonial

government has received sufficient delegated authority from the Crown to exercise the authority which the Crown had a right to exercise through the colonial government if properly communicated to it, and whether the Crown has the right without Parliamentary authority to exclude an alien. Their Lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British Court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies. When once it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory, their Lordships are of opinion that it would be impossible upon the facts which the demurrer admits for an alien to maintain an action. Their Lordships, therefore, do not think it would be right on the present appeal to express any opinion upon the question which was elaborately discussed in the very learned judgments delivered in the Court below—viz., what rights the executive government of Victoria has, under the constitution conferred upon it, derived from the Crown. It involves important considerations and points of nicety which could only be properly discussed when the several interests concerned were represented, and which may never become of practical importance, and their Lordships feel bound, upon the grounds which they have indicated, to abstain from pronouncing upon them on the present occasion. For the reasons which have been submitted, and which are indeed involved in the very able judgment of Mr. Justice Kerferd, with which their Lordships gather that the Chief Justice concurred, their Lordships will humbly recommend her Majesty that the judgment of the Court below be reversed, and judgment entered for the defendant in the terms of the consent order. There will be no costs of this appeal.

Solicitors for the appellant: *Freshfields & Williams.*
Solicitors for the respondent: *Lee, Ockerby, & Everington.*

[PRIVY COUNCIL.]

J. C.* 1891 *Feb.* 25; *March* 4; *May* 2.

TOOTH . . . . . PLAINTIFF;

AND

POWER . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Crown Lands Alienation Act, 1861—*Conditional Purchase in the Name of an Infant—Non-compliance with the Conditions of the Act.*

The respondent (an infant of six years) having been entered by the appellant, under the Crown Lands Alienation Act, 1861, as a conditional purchaser of land selected by the appellant as forming part of his own run, the latter paid the deposit money, made the requisite statutory improvements at his own expense, continued to occupy the same as part of his own run, and paid the balance of the purchase-money.

In an action by the appellant after the respondent came of age, to have the latter declared a trustee for him, and for an order of transfer:—

Held, (*a*) that the respondent was not a statutory purchaser, since the conditions of the Act were not complied with by him personally, nor by another for his benefit.

O'Shanassy v. *Joachim* (1 App. Cas. 82) distinguished.

(*b*) That the appellant was not a statutory purchaser, since his proceedings, being under cover of the respondent's name with a view to create in him a right subject to a resulting trust, were not a compliance with the conditions of the Act.

Barton v. *Muir* (L. R. 6 P. C. 134) distinguished.

APPEAL from a decree of the full court (Aug. 7, 1889) reversing a decree of the Primary Judge in Equity (April 1, 1889) and dismissing the appellant's suit with costs.

The facts are stated in the judgment of their Lordships. The report of the case in the court below, in which doubts were expressed as to the correctness of the ruling in *Barton* v. *Muir* (1), will be found in 10 N. S. W. L. R. 143. The Chief Justice dissented from the judgments of Stephen and Windeyer, JJ.

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD FIELD.

(1) Law Rep. 6 P. C. 134.

Sir *Horace Davey*, Q.C., and *Farwell*, Q.C., for the appellant, contended that the lands were in the hands of the respondent, bound by a resulting trust in favour of the appellant. The transactions by which the respondent became a trustee of the lands were not in contravention of any statute, or illegal in any way. *Barton* v. *Muir* (1) governed this case. The respondent had been validly created a conditional purchaser under the Act, and the Crown was bound to grant the fee simple on payment of the balance of purchase-money. Reference was also made to *O'Shanassy* v. *Joachim* (2); *Dyer* v. *Dyer* (3); *Hall* v. *Loder* (4); *Daniell* v. *Wallace* (5); *Forrest* v. *Forrest.* (6)

Rigby, Q.C., and *Ingpen*, for the respondent, contended that there was no resulting trust as claimed by the appellant. They accepted the decision in *Barton* v. *Muir.* (1) They agreed that the respondent was entitled as conditional purchaser under the Act by reason of the proceedings which had been taken, but contended that he was under no obligation, legal or equitable, to transfer his rights to the appellant. He had never entered into any agreement, express or implied, with the appellant with reference to the lands in question, or with reference to any money expended in respect thereof. The money paid by the appellant in respect of the land or its improvements was not paid at the request or for the use of the respondent. No resulting trust in favour of the appellant could be implied from the circumstances. The right to select and the duty to reside were conferred by the Act, and were personal to the respondent. The consideration moved from him to the Government. Under the Act of 1861 the appellant had no title, for he had not complied with the conditions. Reference was made to *Falcke* v. *Scottish Imperial Insurance Co.* (7) Besides the colonial cases referred to by the appellant, reference was made to *Stephen* v. *Stallworthy.* (8)

Sir *H. Davey*, Q.C., replied.

(1) Law Rep. 6 P. C. 134.
(2) 1 App. Cas. 82.
(3) 2 Cox, 92; 1 W. & T. (6th ed.) 236.
(4) 7 N. S. W. L. R. Eq. 44.
(5) 2 N. S. W. L. R. Eq. 20.
(6) 34 L. J. (N.S.) 428 (Ch.).
(7) 34 Ch. D. 241.
(8) 2 N. S. W. L. R. Eq. 55.

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1891. May 2. The judgment of their Lordships was delivered by

LORD WATSON:—

This appeal, from the Supreme Court of New South Wales, involves the consideration of the Conditional Purchase Clauses of the Crown Lands Alienation Act of 1861 (25 Vict., No. 1); and the question which it raises would have been one of general importance had the leading enactments of these clauses not been in effect superseded by the provisions of the Lands Acts Amendment Act, 1875 (39 Vict., No. 13).

The scheme of the Act of 1861 is simple enough. Sect. 13 declares certain Crown lands within the colony to be open for conditional sale by selection, and empowers "any person" to tender an application to the local land agent for the purchase of not less than forty or more than 320 acres of such lands at the price of 20*s.* per acre, along with a deposit of 25 per cent. of the purchase-money. In the event of there being no other tender for the same land, the applicant is to be declared the conditional purchaser; and s. 15 makes it the duty of the land agent to enter the particulars of the application in a book kept for the purpose, and to transmit an extract of the entry to the proper officer of the Government.

Sect. 18, which is the material clause in this case, enacts that, on the expiry of three years from the date of the entry, or within three months thereafter, the balance of the purchase-money shall be tendered at the office of the colonial treasurer, together with a declaration by the conditional purchaser or his alienee, or some other person competent, to the effect that improvements to the extent and of the character required by the Act have been made upon the selected land, and "that such land has been, from the date of occupation, the bonâ fide residence, either continuously of the original purchaser or of some alienee or successive alienees of his whole estate and interest therein, and that no such alienation has been made by any holder thereof until after the bonâ fide residence thereon of such holder for one whole year at the least." Upon the minister being satisfied with the declaration, it is enacted that the colonial treasurer shall receive and acknowledge the balance of the purchase-money, and that a grant of the

fee simple, under reservation of minerals, shall be made to the then rightful owner. Payment of the balance may be deferred, upon condition of interest being regularly paid at the rate of 5 per cent. In default of compliance with the provisions of this section, the land reverts to Her Majesty, and the original deposit is forfeited.

Sect. 16 prescribes that the occupation of the conditional purchaser must commence within one month from the date of his purchase. Under sect. 21, purchasers of a parcel of land not exceeding 280 acres may make an additional selection of land adjoining, so that their entire holding shall not exceed 320 acres, and the addition so made is subject to all the conditions of the original purchase except residence.

It thus appears that a conditional purchase, effected by payment of one-fourth of the statutory price, is an inchoate title, which merely gives the purchaser right to occupy a particular parcel of land in the manner required by the Act for its ultimate acquisition in fee. Upon due compliance with the prescribed conditions of residence for three years, and of making improvements, the conditional purchase becomes an absolute right to obtain a grant in fee simple upon payment of the remaining three-fourths of the price. The right is capable of being alienated, but no owner of the right can legally alienate until he has resided upon the selection for one year at least. The residence which the Act requires in order to perfect the right must be the personal residence of the real owner of the right, whether he be the original purchaser or a legal alienee, and it must be bonâ fide and continuous. The purchaser's powers of disposal, after he has obtained a grant in fee from the Crown, are unrestricted; and their Lordships can find nothing in the Act which would prevent him, whilst his right is incomplete, from entering into a personal contract binding himself to convey the land to another after he has acquired it in fee.

The appellant, plaintiff in the Court below, is the occupant of a station or run in the county of Auckland, parts of which were liable to be taken up by selectors under the enactments already referred to. On the 17th of November, 1871, he entered the name of the respondent and defendant in the land agent's book

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as the conditional purchaser of 100 acres of land forming part of his own run; and, on the 15th of August, 1873, he added to the purchase previously made by him in the defendant's name sixty-four adjoining acres of the same run, under the provisions of sect. 21. The plaintiff paid the deposit-money for both parcels, and made the requisite statutory improvements at his own expense. After the lapse of the residential period prescribed by the Act, he arranged with the proper authority that payment of the balance of the purchase-money should be deferred; and he continued to pay interest upon that balance until he instituted the present suit in August, 1888. Since the date of the conditional purchase there has been no change in the possession of the selected land, which has all along been occupied by the plaintiff as part of his run.

The defendant was, in November, 1871, an infant about six years of age, his parents being servants in the employment of the plaintiff. The father, who was examined as a witness, denies that he gave the plaintiff any authority to use his son's name, but admits that he was aware, at the time, of the use which was made of it. Upon the pleadings and evidence the residence of the defendant upon the land, and its attendant circumstances, are left in a very unsatisfactory state. It appears to be the fact that, for at least three years following November, 1871, the defendant was taken by his mother from his father's house to a dwelling of some kind on the selected land belonging to the plaintiff, and there resided with her. The plaintiff alleges that the defendant was taken there at his request, which seems probable; and the defendant, whilst not admitting the allegation, gives no explanation of how he came to be there.

The defendant attained majority in 1885, but does not appear to have asserted that he had any personal interest in the selection until March, 1888, when he tendered payment of interest upon the balance of purchase-money, and was informed by the land agent that it had already been paid by the plaintiff. He then attempted to sell his interest as selector, whereupon the plaintiff brought this action, in which he claims to have the defendant declared to be trustee for him of both conditional purchases, and ordered to transfer to him; or, otherwise, to

have the defendant restrained from alienating except to the plaintiff.

The Primary Judge in Equity gave the plaintiff a decree in terms of the first alternative of his claim; but his decision was reversed on appeal by the full Court, consisting of His Honour the Chief Justice, with Stephen and Windeyer, JJ., who dismissed the action, with costs. The learned Judge in Equity, and in the Appeal Court the Chief Justice, were of opinion that there was a resulting trust in the defendant for behoof of the plaintiff. The majority of the full Court held that the transactions of the plaintiff with regard to the conditional purchase of the land in question did not comply with, but were a mere attempt to evade the conditions of the Act of 1861, and could not therefore raise any statutory right either in the plaintiff or in the defendant.

At the hearing of this appeal, their Lordships had not the advantage of having any argument addressed to them in support of the reasoning which prevailed in the full Court. Both parties impeached that reasoning, and were at one in maintaining that a valid right of conditional purchase had been constituted as against the Crown, entitling the true owner of the right to a grant of the lands in fee simple upon payment of the price in full; and the controversy at the bar was limited to the question —which of the parties ought to be regarded as the true owner? On the one hand, the plaintiff contended that the real interest was in himself, the interest of the defendant being merely nominal, and that there was a resulting trust in favour of the plaintiff. On the other hand, it was argued for the defendant that the doctrine of resulting trusts had no application to the right of conditional purchase, and that he was under no obligation, legal or equitable, to transfer it to the plaintiff; because, in the first place, the plaintiff, in order to acquire the right, had used, not his name only but his individual right of pre-emption under the Act of 1861; and, in the second place, the condition of residence, which he had personally fulfilled, was a material part of the consideration.

If it were clear that the plaintiff's proceedings did create a right of conditional purchase in terms of the Act, their Lordships

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would not be prepared to differ from the Primary Judge in Equity and the learned Chief Justice. The right of selection was not personal to the defendant, but was open to any person in the colony, and their Lordships do not think that the defendant's residence upon the land could, in the circumstances already explained, be regarded as consideration moving from him. When he came of age he was free either to ratify or repudiate the use which had been made of his name; but he could not then accept the right, and at the same time decline to recognise the beneficial interest of the person by whom it had been created, with his own funds, and for his own benefit. If he chose to repudiate, the statutory purchase being valid, the plaintiff, as the real purchaser, could have enforced his rights as such by a direct claim against the Crown, passing over the nominal intermediary.

It therefore becomes necessary to consider whether any right of conditional purchase has been constituted in the name of the defendant which can be the subject of a resulting trust for the plaintiff. In dealing with that question their Lordships do not find it necessary to canvass the policy of the Act—an expression which is apt to mislead, because it may signify either the general scheme of land settlement which the Legislature was desirous of promoting, or the special machinery which has been devised and enacted for the purpose of carrying out that scheme. The Act, in so far as it relates to conditional purchases, is not prohibitory, but enabling. It confers the privilege of acquiring in fee a certain area of Crown land, at a cheap rate, upon any person who chooses to comply with the conditions which it prescribes; and no one can be held to have acquired a statutory right or interest unless it is shown that he has substantially fulfilled these conditions.

The Act of 1861 gives the privilege of conditional purchase to "any person," and the amending Act of 1875 (sect. 6) declares that these words shall, "in respect to conditional purchases applied for and made previous to the passing of this Act be held to mean and include any person, whether under or over the age of twenty-one years." Their Lordships do not doubt that, under these enactments, an infant of maturer years might personally

apply for and complete a conditional purchase of Crown land. Nor do they question the authority of the colonial cases which were before this board in *O'Shanassy* v. *Joachim* (1), in which very young children were held to have become purchasers, they residing with their parent upon the selection, and the parent making improvements and paying the purchase money by way of advancement to them. It is quite consonant with legal principle that what is done in the name and in the interest of an infant by one who stands in loco parentis shall be held to have been done by the infant himself, so as to constitute compliance with the Act sufficient to create a valid interest in him; but it does not follow that what is done by a stranger, in name of an infant, for his own behoof, and with no intention of benefiting the infant, can be regarded as fulfilment by the latter of the statutory conditions.

Upon the facts of this case, their Lordships have come to the conclusion that the proceedings taken by the plaintiff with the view of creating a right of conditional purchase in the infant defendant as trustee for him were simply a colourable attempt to comply with the provisions of the Act. There does not appear to them to have been substantial compliance with any one of the conditions which the Act prescribes. The deposit was neither paid by the defendant nor on his account. The statutory improvements were not made by the defendant nor for his benefit. And, in these circumstances, their Lordships are unable to hold that the three years' residence of the defendant upon the selection before he was ten years of age, whether that residence was at the instigation of the plaintiff or not, could constitute the bonâ fide residence of a selector within the meaning of sect. 18 of the Act.

It appears from the judgment delivered by the learned Chief Justice that he and the Primary Judge in Equity would have agreed with the majority of the full Court, had they not been constrained to decide otherwise by the authority of *Barton* v. *Muir* (2). The circumstances of the present case differ so widely from the facts with which this board had to deal in *Barton* v. *Muir* (2) as to render it unnecessary for their Lordships

(1) 1 App. Cas. 82. (2) Law Rep. 6 P. C. 134.

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to enter upon a critical examination of the reasons assigned for its decision. In that case the defendant was of full age, and all the conditions prescribed by the Act were performed by him voluntarily and personally, and not by another individual under cover of his name.

Their Lordships think it right to add that, although, for obvious reasons, the case of *Barton* v. *Muir* (1) was relied on as an authority absolutely binding upon them by both parties at the bar, yet it would have been their duty, had the necessity arisen, to consider for themselves whether the decision is one which they ought to follow. It was given ex parte; and that being the case, although great weight is due to the decision of this board, their Lordships are "at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from these reasons, to decide upon their own view of the law." These are the words used by Earl Cairns when delivering the judgment of the board in *Ridsdale* v. *Clifton* (2), which contains a full exposition of the law upon this point.

Their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The defence set up by the respondent has not been meritorious. He attempted but has failed to show that any right of conditional purchase vested in him, and if he had succeeded in establishing that proposition he would not have been in a position to resist the claim of the appellant. Some costs ought to be allowed to a party who has been compelled to oppose an improper decree being made against him. Possibly the more logical course would be to deprive the defendant of costs in the Court below, and give him costs here, but it appears to their Lordships that justice will be done by permitting the decree of the full Court to stand, and allowing no costs of this appeal.

Solicitors for appellant: *Waltons, Johnson & Bubb.*
Solicitors for respondent: *Rodgers & Clarkson.*

(1) Law Rep. 6 P. C. 134. (2) 2 P. D. 306.

[PRIVY COUNCIL.]

In re JABLOCHKOFF'S PATENT.

J. C.*
1891
April 15, 22;
May 13.

Practice—Confirmation and Extension of Patent—Relaxation of Rule No. 1 *with regard to Notices—Expiration of previous Foreign Patent.*

By sect. 25 of 15 & 16 Vict. c. 83, an English patent ceases at the expiration of a prior foreign patent for the same invention.

Sect. 113, sub-sect. 1, of 46 & 47 Vict. c. 57, saves to a patentee existing at the date of the Act his right to a confirmation under 5 & 6 Will. 4, c. 83, s. 2, subject however to the above qualification.

The provisions of rule 1 relating to confirmation relaxed under special circumstances.

Petition for prolongation refused as inadmissible either under the Act of 1883 or the earlier law.

ON the 23rd of January, 1891, the Electrical Engineering Corporation, Limited, petitioned for the prolongation of letters patent, No. 1996, dated the 22nd of May, 1877, and granted to Paul Jablochkoff, for the invention of "a new process of producing and dividing electric light and apparatus therefor."

On the 15th of April the petition came on for hearing; but prior thereto it had come to the knowledge of the petitioner that the letters patent had been granted for an invention which was not new at the date thereof. The case was accordingly allowed to stand over; and on the 17th of April a further petition was presented for confirmation thereof under the powers granted by 5 & 6 Will. 4, c. 83. It set out a list of the advertisements which had already been inserted in the matter of the prolongation, submitted that that was sufficient notice, and prayed that further advertisements might be dispensed with, as all persons who were interested in the confirmation were also interested in the extension; the object being to enable the petition to be brought to a hearing before the expiry of the patent on the 22nd of May. The petition came on for hearing on the 22nd of April.

Moulton, Q.C., and *Walton*, for the petitioner.

* *Present:*—Lord Watson, Lord Hobhouse, Lord Morris, and Mr. Shand (Lord Shand).

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In re JABLOCHKOFF'S PATENT

Sir *R. Webster*, A.G., and *Sutton*, for the Crown.

LORD WATSON :—

Their Lordships are of opinion that this is a case in which the rule with respect to notices may be relaxed without detriment to the public, and they will fix the 13th of May next for the hearing of both petitions. They will dispense with the provisions of rule 1 relating to proceedings under 5 & 6 Will. 4, c. 83, but they direct the petitioner to give due notice of the hearing of the petition for confirmation in each number of the *London Gazette* and other publications specified by their Lordships which are published before that date.

The petitions for confirmation and extension came on for hearing on the 13th of May.

Wallace and *Renton*, for the petitioner.

Sir *R. Webster*, A.G., and *Sutton*, for the Crown.

A preliminary objection was taken by the Attorney General, the nature of which sufficiently appears in the judgment of their Lordships.

The cases cited were *In re Normand's Patent* (1); *Daw* v. *Eley* (2); *Singer* v. *Stassen* (3).

1891

May 13.

The judgment of their Lordships was delivered by

LORD WATSON :—

There are two separate applications in regard to this patent. In the one their Lordships are invited to recommend that the patent be confirmed in terms of sect. 2 of 5 & 6 Will. 4, c. 83, and in the other to recommend that a prolongation of the patent be given for such time as may seem to them to be just. The English patent bears date the 22nd of May, 1877; but in the same year, at a previous date, viz., on the 6th of February, 1877, the same invention was secured for the patentee in Belgium, and

(1) Law Rep. 3 P. C. 193. (2) Law Rep. 3 Eq. 496.
(3) 1 Cutler's Rep. Pat. Cas. 121.

that right or privilege was declared to have lapsed by Royal Decree on the 8th of October, 1888. It is conceded in argument by the petitioners that no application for confirmation of a patent can be made under the Act of 1883 (46 & 47 Vict. c. 57); but it is contended that while that statute abolishes 5 & 6 Will. 4, c. 83, the Board is still in a position to entertain a petition for confirmation by virtue of sect. 113 of the Act of 1883, which saves the operation of the former Act (to a certain extent, which it may be necessary afterwards to deal with) in so far as it relates to patents which were in force at the time when the statute of 1883 became law. If the Act of William IV. stood alone, the case of the petitioners would be comparatively plain; but the powers of confirmation which were conferred by that statute were qualified by the Patent Law Amendment Act of 1852 (15 & 16 Vict. c. 83), sect. 25 of which enacted that in the case of an English patent, where a previous patent for the same invention had been taken out in a foreign country, the patent should "cease and be void immediately upon the expiration or other determination of the term during which the patent or like privilege obtained in such foreign country should continue in force." If that qualification still applies to the patent right of the petitioners there is an end to their case, because the patent lapsed in 1888 along with the Belgian right in terms of the statute. But the argument that has been addressed to their Lordships has been to this effect, that whilst sect. 25 of the Act of 1852 is wholly repealed in so far as regards their patent rights, sect. 2 of 5 & 6 Will. 4 is kept alive in their favour. Now, that argument is founded upon the provisions of sect. 113, sub-sect. 1, of the Act of 1883, which appear to their Lordships upon consideration to be fatal to the contention which has been addressed to them. The saving clause in favour of patents in force at the date of the statute is in these terms. It is declared that "this repeal of enactments shall not affect the past operation of any of those enactments, or any patent or copyright, or right to use a trade-mark granted or acquired, or application pending, or appointment made, or compensation granted, or order or direction made or given, or right, privilege, obligation or liability acquired, accrued or incurred, or any-

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thing duly done or suffered under or by any of those enactments before or at the commencement of this Act." Now, it appears to their Lordships that at the date when the statute of 1883 passed there were incidental to the right of the patentee or the assigns in possession of the patent before us, first, a right to confirmation, should it be necessary, under 5 & 6 Will. 4, c. 83, but in the second place a liability to have their right determined in the event of the lapse of the Belgian patent. This was a right and liability which had arisen and become attached to the patent at that date; and it certainly appears to their Lordships that, looking at the language employed by the legislature, which saves all obligations and all liabilities attaching to or incidental to the patent, as well as all rights which had arisen out of the patent, it was impossible for them to infer that the legislature meant to retain to patentees whose rights were older than the statute a right to confirmation without the corresponding qualification which was introduced by the legislature of 1852. It appears to them that the petitioner here cannot appeal to the provisions of 5 & 6 Will. 4, c. 83, without submitting at the same time to the qualification of the statutory right introduced by the Patent Law Amendment Act, 1852, and, therefore, the application must be dismissed.

There remains the petition for the extension of the patent, which may be very shortly dealt with. As regards that application the petitioners are in this dilemma. If it be represented as a petition presented in terms of the recent Act, the answer is conclusive that the statute has not been complied with because it was not presented more than six months before the natural currency of the patent came to a close. The other alternative is that it is an application under the old law, and if it is viewed in that aspect the provisions of sect. 25 of the Patent Law Amendment Act, 1852, are as fatal to the power of this Board to deal with the matter of extension as those provisions were fatal in the other case of application for confirmation, and, therefore, this petition also must stand dismissed.

Solicitors for petitioner: *Faithfull & Owen.*
Solicitor for Crown: *The Solicitor to the Treasury.*

[HOUSE OF LORDS.]

J. T. SMITH AND THE BARROW HÆMATITE STEEL COMPANY, LIMITED . } APPELLANTS;

AND

HENRY COOKE, RACHEL SWINNERTON, AND OTHERS . . . . . } RESPONDENTS.

H. L. (E.) 1891 May 5.

SIR THOMAS STOREY, KNIGHT . . . APPELLANT;

AND

HENRY COOKE, RACHEL SWINNERTON, AND OTHERS . . . . . } RESPONDENTS.

Creditors' Deed, Construction of—Resulting Trust.

The partners in a business, by a deed reciting the inability of the firm to pay their creditors, assigned the business and property of the firm to trustees upon certain trusts for the benefit of the creditors of the firm. The deed contained no provision in the event of there being a surplus:—

Held, reversing the decision of the Court of Appeal and restoring the decision of Kekewich J. (45 Ch. D. 38) that upon the natural and true construction of the deed there was an absolute disposal of all the proceeds to be realized for the benefit of the creditors, and that no resulting trust for the benefit of the assignors could be implied.

THESE two appeals were from the same order of the Court of Appeal and raised the same question, which turned entirely on the construction of a deed of assignment to trustees for the benefit of creditors. The deed and the material facts are stated in the report of the decisions below (1). Kekewich J. held that the plaintiffs (who represented the assignors and brought an action against the trustees and a creditor, claiming (inter alia) an account) had no title to maintain the action on the ground that no resulting trust was to be implied. This decision was reversed by the order of the Court of Appeal (Cotton, Bowen, and Fry L.JJ.) which declared that a trust resulted in favour of the assignors. Against this order the present appeals were

(1) 45 Ch. D. 38.

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brought; the first by one of the trustees and a creditor; the second by the other trustee.

Sir *H. Davey* Q.C. (*Renshaw* Q.C., *Farwell* Q.C., and *Rowden* with him) for the appellants in the first appeal.

Rigby Q.C. (*J. M. Solomon* and *L. Sanderson* with him) for the appellant in the second appeal.

Neville Q.C. and *T. E. Mansfield* for the respondents in both appeals.

Sir *H. Davey* Q.C. in reply.

[The precedents in Martin's Conveyancing (1st ed.) vol. v. p. 440; Forsyth's Composition with Creditors (3rd ed. 1854) p. 230; Davidson's Precedents (3rd ed. 1878) vol. v. pt. 2, pp. 521, 532, were referred to.]

LORD HALSBURY L.C.:—

My Lords, I confess to have entertained considerable doubt at the commencement of the argument in this case. The fact of there being two parties to this transaction (I speak of them as two in their collective capacity), the debtors and creditors, seemed to me to suggest the idea that when the debtors were surrendering their property to their creditors for the purpose of the payment of their debts, there would be a sort of natural equity that if the debts were paid, anything which remained over and above after the debts were paid, should go to the assignors. I confess to have listened, with that tendency in my mind, to the argument addressed to your Lordships by the learned counsel for the appellants. But gradually, as I looked at the deed itself and saw what the exact provisions were, I became unable to adhere to that view. It seems to me that one must take the language of the instrument itself in its ordinary and natural meaning, and having endeavoured so far as one can to construe it in that ordinary and natural meaning it does not matter that it appears not to carry out the view that one would in the first

instance have imagined the parties intended it to carry out. The fact remains that the assignors have assigned all this business and have given power to the trustees to carry on the business. By the language which they have used they appear to me to have absolutely disposed of all that they had to dispose of and to have allowed what was the result of that transaction to be not merely applied in payment of debts but divided in proportion to the debts due to the persons for whose benefit this assignment was made. Under those circumstances the difficulty which I had in carrying out the view which I first entertained was that I could find no language apt to do that which I should have thought the parties would have done.

If I am to look at the precedents I am disposed to think that they tell a story in another direction. If it is intended to have a resulting trust, the ordinary and familiar mode of doing that is by saying so on the face of the instrument; and I cannot get, out of the language of this instrument, a resulting trust except by putting in words which are not there. I must say I for one have always protested against endeavouring to construe an instrument contrary to what the words of the instrument itself convey, by some sort of preconceived idea of what the parties would or might or perhaps ought to have intended when they began to frame their instrument.

My Lords, in the result I am unable to concur with the judgment of the Court of Appeal. It appears to me that the judgment of Kekewich J. proceeded upon the assumption that the parties had by their instrument expressed the whole of their intentions, and I think I am not entitled to put into the instrument something which I do not find there, in order to satisfy an intention which is only reasonable if I presume what their intentions were. I must find out their intentions by the instrument they have executed; and if I cannot find a suggested intention by the terms of the instrument which they have executed I must assume that their intentions were only such as their deed discloses.

Under these circumstances I am compelled to move your Lordships that the order appealed from be reversed and that this appeal be allowed.

H. L. (E.) 1891 SMITH v. COOKE. STOREY v. COOKE.

LORD HERSCHELL:—

My Lords, but for the sincere respect which I entertain for the opinion of the learned judges in the Court of Appeal in this case, who took a different view, I own that I should have thought the matter free from difficulty. The question is whether upon the provisions of this deed there is a resulting trust in favour of the present respondents. Certain property is vested in trustees for the purpose of ultimate realization, and the deed contains trusts relating to the disposal of those proceeds. If the trusts providing for the disposal of the proceeds realized did not provide for the disposal of the whole of those proceeds but left a part undisposed of in the hands of the trustees, no doubt, upon well-known principles, it would be impossible to avoid the conclusion that there was a resulting trust of that surplus in favour of the persons who had made the assignment, and that the trustees were not intended to hold it for their own benefit. But, my Lords, if upon the true construction of the deed the whole of the proceeds are disposed of there is nothing to which a resulting trust can be applicable, because the deed has itself provided for the disposal of the whole of the trust fund and there remains nothing therefore which the trustees can be said to hold for the benefit of the assignors.

Now it is not disputed, and indeed could not be disputed, that upon the natural construction of the language used the whole of the proceeds are disposed of. The trust is, to pay and divide the sum realized amongst the creditors of the firm in rateable proportions according to the amount of their debts; and if the money is so paid and divided amongst them, obviously nothing remains in the hands of the trustees. But the contention on behalf of the respondents, to which the Court below yielded, was that the terms of the trust were not to be construed according to their natural meaning, but that some other interpretation was to be put upon them which would leave funds in the hands of the trustees. Now, my Lords, I think it is important to bear clearly in mind that the respondents' contention can only be made good by altering the words of the deed and inserting a provision, or substituting a provision, which really is not to be found there. My Lords, I apprehend that that ought not to be done unless

some very substantial ground can be given for doing it. There is no impossibility of carrying out the trust according to the natural meaning of its terms. To do so would create no absurdity, nor would there be anything inconsistent with any of the other provisions of the deed.

My Lords, when that is the case, I certainly should find it very difficult to put any other than the natural construction upon the language used, unless you could find in the deed itself some other provision which shews that taking the deed as a whole (which I admit ought properly to be done) the manifest intention was other than that which it would appear to be according to the first impression derived from reading the language used. But, my Lords, when I examine the other provisions of the deed, I am unable to see anything there which shews that the parties did not intend, or could not have intended, that which they have said. The deed shews that the debtors were unable to pay their debts—that their businesses and assets were to be assigned to trustees, and that the creditors were, in consideration of that, to release them. What is there, with the single exception of the clause to which I will advert in a moment for the payment of a creditor under £30, which throws any light upon the trust which I have read to your Lordships, or which affords any reason for saying that it is not to be construed according to its natural meaning?

Reliance was placed upon the clause enabling the trustees to pay creditors under £30 in full or to make arrangements with them. I cannot myself feel that any weight is to be attached, in favour of the argument for the respondents, to the existence of that provision. Of course a creditor under £30 who neither executed this deed nor came in, would be in no way bound by that provision—he might have upset the whole transaction so far as he was concerned; but as to those creditors who have become parties to it, they have become parties to the deed with its terms, such as they are, and they probably would have been quite content that such a provision should be inserted. I cannot myself see how that renders impossible or even improbable a bargain such as is expressed by the language which the parties have used.

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My Lords, that really seems to me to dispose of the whole of the case. No doubt it would be a very serious matter if a deed of this description were a common form which had been used for the purpose of what is termed a creditors' deed, and if there were no other form appropriate to the purpose where it was intended merely to create a trust for the payment of debts, and there was to be a further trust of the surplus for the assignors. But it is admitted that such a form of deed is perfectly well known, and there would have been no difficulty in so framing the deed if it had been so intended; and why if the intention were such as is contended for it should not have been framed in that form I am totally unable to understand. No reason has been suggested. It would have been the simplest thing in the world, even if you did not put in the ultimate trust, to make this trust not a trust to pay and divide the proceeds, but a trust to discharge the debts or to pay and divide rateably in payment or towards the payment of the debts. Any number of slight variations might be suggested, all of which would have met the purpose, and have made the thing perfectly clear. My Lords, that being so, why this form of words should have been selected is past my comprehension, which in that respect was not assisted by any suggestion from the learned counsel for the respondents. I think therefore there would be a risk of doing what was wrong if you were, upon any speculation as to what the parties probably intended, to depart from the language which they have used, and to put into their agreement a provision which is not to be found there.

My Lords, I think that the explanation of the precedent relied on containing this provision, and not containing any trust, may be this, that in the precedent relied on it was a provision for an immediate sale and distribution; and of course such a deed would not be resorted to except in a case where the assignor was unable to pay the debts in full and knew therefore that the realisation would be and must be a realisation of something less than would pay them in full. In that case of course the parties would all know and intend that it was a case in which there never could be a surplus because the provision was immediately to turn into money that which it was known would not be sufficient to pay the debts. But in the present case it is not a

deed for immediate realisation—it is a deed which allows the carrying on of the business, which may long postpone the realization and which may make the sum ultimately realized something entirely different from that which would have come into the hands of the trustees if there had been an immediate sale. If a precedent such as has been referred to is to be applied to such a case as this and if those who framed this deed chose to apply it, we really cannot go behind the deed containing the words which they have used and speculate upon what their intentions were. The duty of the Court is to give the natural meaning to the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed, and would therefore be contrary to the intention of the parties as appearing upon the face of the deed. My Lords, finding no authority and no principle for departing from the natural meaning of the language used I feel constrained to come to the conclusion that the decision of the Court below ought to be reversed.

LORD MACNAGHTEN :—

My Lords, I am of the same opinion. On the language of this particular deed I am of opinion that the assignors divested themselves of all interest in the property for the benefit of their creditors, not that they put the property in trust, for a special and limited purpose, but that they abandoned it and gave it up altogether. Therefore I am of opinion that there can be no room for any resulting trust.

LORD FIELD :—

My Lords, I am entirely of the same opinion; and after the full exposition of the contents of the deed and of the principles applicable to it, I really have nothing that I can usefully add.

LORD HANNEN also concurred.

Order of the Court of Appeal reversed, and order of Kekewich J. restored: Cooke and Swinnerton to pay the appellants their respective costs in the Courts below, and one set of costs in respect of the

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appeals to this House: cause remitted to the Chancery Division.

Lords' Journals 5th May 1891.

Solicitors for appellants in 1st appeal: *Currey, Holland & Currey.*

Solicitors for appellant in 2nd appeal: *Redpath, Holdsworth & Marshall,* for *C. F. Preston, Barrow-in-Furness.*

Solicitors for respondents in both appeals: *Trass & Jarmain,* for *Frank Taylor, Barrow-in-Furness.*

[HOUSE OF LORDS.]

H. L. (E.)
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May 8.

CHARLES SEALE-HAYNE . . . . . APPELLANT;

AND

SIR ALFRED JODRELL, BARONET, AND OTHERS . . . . . } RESPONDENTS.

Will—Construction.

The decision of the Court of Appeal (44 Ch. D. 590), upon the construction of a will and codicils, affirmed.

THIS case, reported 44 Ch. D. 590, turned entirely on the construction of a will and codicils: the question being whether this particular testator in using certain words (not terms of art) meant one thing or another. Lord Halsbury L.C., in delivering his judgment in the Court of Appeal, said, "I repudiate entirely the notion of laying down any canon of construction which is to extend beyond the particular instrument that I am called upon to give an interpretation to (1)." The will and codicils and the material facts are set out in the report of the decision below.

May 5, 8. *Rigby* Q.C. and *Christopher James* for the appellant.

Crackanthorpe Q.C., *Sir Horace Davey* Q.C., *Moulton* Q.C., *W. B. Trevelyan, Hadley, G. B. Rashleigh, Lyttelton Chubb,* and *Swinfen Eady,* appeared for various respondents, but were not heard.

(1) 44 Ch. D. 590, at p. 605.

LORD HERSCHELL:—

My Lords, two questions arise upon the construction of the residuary clause of the will of the testator in this case, namely, what interpretation is to be put upon the word "relatives," and what is the meaning to be attributed to the expression "my relatives hereinbefore named." My Lords, I will deal with these questions in the order in which I have mentioned them. It is of course not open to dispute that the word "relatives" according to its natural interpretation, if there were nothing to shew that another meaning was to be attributed to it, would not include those who were what may be termed natural blood relations, but whose parents or grandparents were not born in wedlock, and who therefore were not in the eye of the law related to the testator. But it is not disputed that if the testator has in the provisions of his will indicated whom he considers to be "relatives" in the sense in which he is speaking of relatives, or members of his family, you are entitled to look at those other provisions in order to interpret the word "relatives" as used in this part of his will.

In the previous part of the will the testator has spoken of persons who were not legitimately related to him, but as regards whom there existed this blood relationship, as his "cousins." He has indicated, therefore, clearly that in his view they were his relatives, that they were being so regarded by him at the time when he made his will; and obviously when, having mentioned these cousins, he mentions their children, he was viewing *them* also in the light of relations, and it was in that light as expressly specified and designated by him that he was intending to give them benefit under his will. It appears to me therefore impossible to entertain any doubt in the present case, that this testator, when in the subsequent part of his will he speaks of his relatives and refers to them as relatives whom he has benefited under the provisions of his will, is including in that term of "relatives" those whom he has shewn by the expressions to be found in other parts of his will that he was then regarding as relatives.

But then it is said that he has confined his bounty, under this residuary clause, to the "relatives hereinbefore named," that is

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to say, according to the interpretation which your Lordships are asked to put upon the words, hereinbefore mentioned by name. Now it cannot be denied that the word "named," although its primary signification may be "mentioned by name," is also used, and used in no unnatural sense, as synonymous with "specified" or "mentioned;" and I do not think that there is any hard and fast rule to be laid down that in construing a will you are always to give to any particular word that is used what is called its primary meaning. A word which is used commonly in the English language in several senses must be interpreted according to that which, having regard to the context and the whole of the provisions of the document which you have to construe, appears to be the sense in which the testator has used it.

Now, my Lords, I confess that for my own part, reading the will alone without regard to the considerations derived from the codicil, the impression produced is that the testator did not intend, by using the language "hereinbefore named" to confine the words "such of my relatives hereinbefore named" to those relatives of whom he had mentioned the Christian name and the surname. It is not easy to give reasons for such an impression. It is difficult to say more than that that is the effect which the perusal of the words in this will produces upon one's mind. But what certainly weighs with me is this, that I do not think the testator in this residuary clause intended to lay stress on the word "named" in the words "hereinbefore named." What he intended to lay stress upon was this, that it was not all the relatives who had been made the objects of his bounty in the earlier part of the will whom he intended to share in this residue, but only those relatives the objects of his bounty who should take a vested transmissible interest. I think that is what he is intending by the expressions which he is using in this residuary clause; and I do not think, as I have said before, that the emphasis was intended to be upon the "relatives *hereinbefore named*," but upon "such of my relatives hereinbefore named *as shall become entitled to a vested transmissible interest.*" It may be that the words "hereinbefore named" were inserted inasmuch as some of the persons benefited, whom he describes as related to him, were not strictly speaking relatives. It may be

that the words "such of my relatives hereinbefore named" were intended to indicate that the persons whom he had spoken of as "relatives" in the earlier part of the will, though not strictly his relatives, were persons who, if they complied with the condition, were intended by him to take the benefit.

Now, my Lords, I think I should have arrived at that conclusion merely upon a perusal of the terms of the will. But when one comes to the fifth codicil and considers that the testator had then before him and under his consideration the residuary clause of this will, if he was drawing this distinction between persons described and persons named, and if that distinction was one of the cardinal points of his will—and he must be taken to have had present to his mind who were the persons whom he had named—when he is minded to make it clear that certain persons, namely, three of his nieces, were not to take benefits under this residuary clause, it is to me really inconceivable that if he had been using the words "relatives hereinbefore named" in the sense contended for he should have framed the 5th codicil in the manner in which he has done, because by the 10th clause of that 5th codicil he excludes those three persons from participating in the division of his residuary estate as directed by the 37th clause. At that time if the contention of the appellant be well founded, there was only one person entitled under that residuary clause; there would therefore be no question of division at all; and the simple and natural course to have adopted, if the testator had so understood and intended the provisions of the residuary clause, would have been this, merely to provide by a clause in this codicil that the residuary estate should go to this single individual to whom alone it was then in his contemplation that it should go. It appears to me that that would have been a much more natural course to have taken, and one which it is difficult to understand his not taking, rather than putting in this clause in the codicil.

It appears to me, therefore, that if one takes such assistance as one gets from that circumstance, the inference to be derived from the execution of that codicil fortifies that which I own is the conclusion which I should probably otherwise have arrived at, that the true interpretation has been put upon this will by

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the Court below, and therefore this appeal ought to be dismissed.

LORD MACNAGHTEN:—

My Lords, I agree with your Lordships and the Court of Appeal that this is a plain case.

The testator's will certainly appears to have been drawn by a lawyer. But the expression which has given rise to the present argument is not a technical one. The question, as it seems to me, is whether that expression is to be treated as an exercise in cryptography or to be understood in the sense which would I think be naturally attached to it by an educated person of common intelligence, not being either hypercritical or disposed to look for a hidden meaning in ordinary language.

The testator directs the division of his residuary estate after his wife's death in the following terms: "Amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property." In the earlier part of the will he had made bequests to take effect after his wife's death in favour of certain persons named in his will and described as connected with him in certain degrees of relationship. To some he gave an absolute interest on surviving his wife; to others life interests only with remainder to such of their children as should fulfil certain conditions of survivorship. I cannot doubt that all these legatees come under the description of "my relatives hereinbefore named," and that, whether they were or were not relatives in the eye of the law, and whether they were named in the earlier part of the will separately and individually or named by reference to their parentage, being described as children of persons separately and individually named, such of them as should acquire vested transmissible interests were to share in the residue.

To hold otherwise, would, I think, be to defeat the obvious intention of the testator by over-refinement and straining after precision more apparent, perhaps, than real.

I think the matter is sufficiently clear on the face of the will, looking at the residuary clause and the scheme of distribution

in regard to part of the estate which precedes it. But it is certainly satisfactory to find, when you come to the 5th codicil, that the testator himself, considering the state of the family at the time, must have attached the same meaning to the residuary gift which commends itself to your Lordships.

LORD FIELD concurred.

LORD HANNEN :—

My Lords, it is clear that the testator in his will called persons who were not legitimately connected with him his "cousins," that is, he treated them as relatives. This affords us a guide as to what he means when he speaks of his "relatives" in the residuary clause.

Secondly, he divides his residue amongst his "relatives hereinbefore named" who may fulfil certain conditions, and he repeats this provision by confirmation in a codicil at a time when in the events which had happened, there would be only one person to whom the residue would go if "named" means described by Christian or surname. Seeing that his attention, when making his 5th codicil, was necessarily directed to the point who would take under the residuary clause, I think it unreasonable to suppose that he meant to leave one person to take under a provision which directed a division amongst several. This (as it appears to me) unreasonable conclusion is avoided by interpreting the word "named" in one of its recognised meanings as "designated," and I therefore adopt that interpretation.

I think the judgment appealed from should be affirmed.

Order appealed from affirmed and appeal dismissed; the costs of all parties to the appeal to be paid out of the residuary estate.

Lords' Journals 8th May 1891.

Solicitors for appellant : *Druces & Attlee.*

Solicitors for various respondents : *Satchell & Chapple; Witham, Lambert & Roskell; Hasties; Walker & Whitfield; Wadeson & Malleson.*

[HOUSE OF LORDS.]

H. L. (E.) 1891 *June* 26.

THE EASTERN STEAMSHIP COMPANY, LIMITED . . . . . } APPELLANTS;

AND

SMITH AND OTHERS, OWNERS OF "THE VANDALIA" . . . . . } RESPONDENTS.

THE "DUKE OF BUCCLEUCH."

Ship—Collision—Merchant Shipping Act 1873 (36 & 37 *Vict. c.* 85) *s.* 17—*Regulations for Preventing Collision at Sea, Infringement of—Presumption of Blame.*

By s. 17 of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) in a case of collision a ship proved to have infringed any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873 is to be deemed to be in fault.

The doctrine laid down in *The Fanny M. Carvill* (2 Asp. Mar. L. C. (N.S.) 565; 13 App. Cas. 455, n.) approved by Lords Bramwell, Herschell, Macnaghten, and Hannen, viz.:—The true construction of this section is that the infringement must be one having some possible connection with the collision; or, in other words, the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision; and the burden of shewing this lies on the party guilty of the infringement; proof that the infringement did not in fact contribute to the collision being excluded.

The decision of the Court of Appeal (15 P. D. 86) affirmed, the votes for and against being equal.

APPEAL from an order of the Court of Appeal (1) under the following circumstances: About 1 A.M. on the 7th of March 1889 the steamer *Duke of Buccleuch* and the sailing vessel *Vandalia* came into collision in the British Channel. In an action in the Admiralty Division brought by the respondents (the owners of the *Vandalia*) against the appellants (the owners of the steamer) the steamer was found to blame. Butt J. who tried the case found as a fact that the regulation lights of the *Vandalia* were carried so that the port light was on the occasion in question to some extent obscured by one of her sails. On the ground that the *Vandalia* had thus broken Art. 6 of the Regulations for Preventing Collisions at Sea Butt J. held that she also was to blame.

(1) 15 P. D. 86.

On appeal and cross-appeal by the plaintiffs and defendants respectively against so much of the decree of Butt J. as was adverse to each of them the Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ.) did not dissent from the findings of fact but they considered that the *Vandalia* had established that this breach of the regulations could not possibly have contributed to the collision. On this ground the Court of Appeal, adopting the law laid down in *The Fanny M. Carvill* (1), held that the *Duke of Buccleuch* alone was to blame and varied the decree of Butt J. accordingly.

The result of this appeal, as will be seen from the judgments, turned entirely on the facts, as to which the House was equally divided. The case is reported only for the approval by all their Lordships of the doctrine laid down in *The Fanny M. Carvill* (1), and only those parts of the judgments which bear on that point are set out.

Feb. 17, 19. Sir *R. Webster* A.G. (Sir *W. Phillimore*, *Gorell Barnes* Q.C. and *F. Laing* with him) for the appellants contended that the *Vandalia* having infringed one of the regulations was by sect. 17 of the Merchant Shipping Act 1873 to be deemed to be in fault, and that she had not (on a true view of the facts) made out that the infringement could not by any possibility have contributed to the collision: mere proof that the infringement had not in fact contributed being held to be excluded by the statute: see *The Khedive* (2) and *The Lapwing* (3).

Cohen Q.C. and *Myburgh* Q.C. (*F. W. Raikes* with them) for the respondents contended that the *Vandalia* had made out by her evidence that the infringement could not possibly have contributed to the collision, and relied on the doctrine of *The Fanny M. Carvill* (1).

Sir *R. Webster* A.G. in reply.

[The following cases were also referred to: *The Tirzah* (4); *The Arklow* (5); *The Fire Queen* (6).]

(1) 2 Asp. Mar. L. C. (N.S.) 565; 13 App. Cas. 455, n.
(2) 5 App. Cas. 876, 893, 894.
(3) 7 App. Cas. 512, 515.
(4) 4 P. D. 33.
(5) 9 App. Cas. 136.
(6) 12 P. D. 147.

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EASTERN STEAMSHIP COMPANY. v. SMITH. — THE "DUKE OF BUCCLEUCH."

My Lords, early on the morning of the 7th of March 1889, the steamer *Duke of Buccleuch*, and the sailing vessel *Vandalia*, the former outward, the latter inward bound, came into collision in the British Channel. In an action brought by the owners of the *Vandalia* against the owners of the steamer, the latter was found to blame, and upon this finding no question arises. The learned judge who tried the cause in the Admiralty Division found that the *Vandalia* was also to blame. This decision was reversed by the Court of Appeal, from whose judgment the present appeal is brought. The ground of the adverse decision as regards the *Vandalia* in the Admiralty Division was that she had broken the sailing rules, and must therefore be held to blame. It was found as a fact that her port light was so placed as to be, on the occasion in question, to some extent obscured by one of her sails. The Court of Appeal did not dissent from this finding, but they considered that it had been established that this breach of the rules could not possibly have contributed to the collision.

The Master of the Rolls after stating that the law applicable to the case was that laid down in *The Fanny M. Carvill* (1), the judgment in which case he entirely adopted, said: "I take it that that case decides this, that if it can be shewn that the vessel has (I will speak only of lights here) her lights not perfect according to the rule, that if you can shew that there is a defect in the lights, that vessel must be held to blame unless she can shew that the defect which exists in her lights could not by any possibility have contributed to the collision which actually takes place." I think this is a correct statement of the law to be applied to the present case, and I do not understand any of your Lordships to dissent from it. The sole question is whether the Court of Appeal has correctly appreciated the facts.

The case certainly comes before your Lordships in an unsatisfactory condition in some respects. The learned judge of the Admiralty Division appears to have thought that the fact that the rule had been broken established the liability of the *Vandalia*, and not to have entered upon the inquiry, what was the extent of the obscuration caused by the sail, and what the relative posi-

(1) 2 Asp. Mar. L. C. (N.S.) 565; 13 App. Cas. 455, n.

tion of the two vessels, and whether the *Duke of Buccleuch* ever could have been within the area of obscuration. Your Lordships have therefore the bare finding that the sail would somewhat obscure the light without any determination of the extent to which it would be interfered with. The amount of interference would depend upon the bellying of the sail. [After discussing the evidence in detail, his Lordship concluded thus:—]

As I am aware that your Lordships do not all entertain the view I have expressed, and out of sincere respect for that difference of opinion, I have repeatedly considered and weighed the facts and arguments, but with the result that I am unable to see, except upon assumptions which appear to me to be inconsistent with the evidence, that the Court of Appeal erred in the judgment which they pronounced. I may add that I am as sensible as any of your Lordships can be of the importance of enforcing the statutory rules, and that I certainly should not be disposed to exonerate a vessel shewn to have broken them, on any minute calculation as to distance or bearing.

LORD BRAMWELL:—

My Lords, I wish that my noble and learned friend (Lord Hannen) had read his opinion to your Lordships before I express mine, because I agree with him, and I have little doubt that I have been much influenced by knowing what his opinion was.

I agree that this is a very unsatisfactory case. I cannot agree that the *Vandalia* is not liable. I agree to the law laid down in *The Fanny M. Carvill* (1). I think the illustration given by Lord Esher irresistible. It would be absurd to hold a vessel liable for a collision on a bright day because she had not a foghorn on board. But I doubt whether the Courts are justified in putting an exception on the statute such as is necessary to exempt the *Vandalia* from liability, an exception giving rise to nice questions. She had her lights where she ought not to have had them. It is said that that could not have caused the collision; and unless it is made out that it could not, which she had got to make out, she is liable.

[His Lordship then discussed the evidence and said he was

(1) 2 Asp. Mar. L. C. (N.S.) 565; 13 App. Cas. 455, n.

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not satisfied that the *Vandalia's* disregard of the rules *could not* have caused the collision, nor that it did not; on the contrary, he inclined to think it did.]

LORD MACNAGHTEN :—

My Lords, this case has caused me a good deal of anxiety and I have been slow to make up my mind upon it. But after giving full weight to the arguments of the learned counsel for the appellants and considering over and over again the opinion of my noble and learned friend opposite (Lord Hannen), I have come somewhat reluctantly to the conclusion that the judgment of the Court of Appeal ought not to be disturbed.

It is at least satisfactory to find that there is no difference of opinion in this House on any point of law involved in the case. Your Lordships are, I believe, all of opinion that the law was correctly laid down in the case of *The Fanny M. Carvill.* (1)

[His Lordship then discussed the evidence and came to the same conclusion as Lord Herschell.]

LORD HANNEN :—[After stating the facts and discussing the evidence as to the position of the lights, proceeded thus :—]

The extent to which the bellying of the sail would cause obscuration is not given by the assessors, and it would appear that Butt J. did not consider it necessary in his view of the law to ascertain this. "Am I to take it," he says, "that this vessel had her yards absolutely sharp braced? I do not think I can. I think the Act of Parliament is passed to prevent my going into these nice questions of fact" (amongst which would also be the extent of the bellying of the sail). And he continues, "I must hold that there was an infringement which might possibly have contributed to or caused this collision." These latter words imply that the learned judge had come to the conclusion that the *Duke of Buccleuch* was in such a position that the obscuration of the *Vandalia's* lights by the foresail might possibly contribute to the collision, and he considered that in accordance with the decision in *The Fanny M. Carvill* (1), and

(1) 2 Asp. Mar. L. C. (N.S.) 565; 13 App. Cas. 455, n.

other cases, he was not bound to find that the obscuration did in fact contribute to the disaster.

This appears to be a perfectly accurate view of the effect of the judgment of the Privy Council in *The Fanny M. Carvill.* (1) Sir James Colville, delivering the judgment of the Judicial Committee, there says: "Their Lordships therefore conceive that whatever be the true construction of the enactment in question that which would take the case out of its operation by mere proof that the infringement of the regulation did not, in point of fact, contribute to the collision is inadmissible. They conceive that the Legislature intended at least to obviate the necessity for the determination of this question of fact (often a very nice one) upon conflicting evidence." He then proceeds to consider the possible constructions which may be put upon the enactment, and he rejects the one that an infringement of any of the regulations gives rise to an absolute presumption of culpability, and adopts the other, "that the infringement must be one having some possible connection with the collision, or, in other words, that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision," and he concludes by saying that this construction "gives effect to the statute by excluding proof that infringement which might have contributed to a collision did not in fact do so, and by throwing on the party guilty of the infringement the burthen of shewing that it could not possibly have done so."

This view of the law was accepted in the Court of Appeal and will, I presume, be approved of by your Lordships, but the Court of Appeal came to the conclusion that the proved infringement by the *Vandalia* of the rule with regard to lights could not possibly have contributed to the collision, and therefore that the *Vandalia* has sustained the burthen of proof required to free her from responsibility.

I regret to say that I cannot concur in this view of the facts.

[His Lordship then discussed the evidence and concluded as follows:—]

For these reasons, I am of opinion that the *Vandalia* has

(1) 2 Asp. Mar. L. C. (N.S.) 565; 13 App. Cas. 455, n.

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failed to establish that the obscuration of her light by her foresail could not possibly have contributed to the collision, and therefore that the judgment of Butt J. should be restored.

Question put, that the judgment or decree complained of be reversed; and it appearing that the votes were equal, thereupon according to the ancient rule in the law, Semper præsumitur pro Negante, *it was determined in the negative; therefore the judgment or decree complained of was affirmed; and the appeal dismissed.*

Lords' Journals 26th June 1891.

Solicitors for appellants: *Gellatly & Warton.*
Solicitors for respondents: *Thomas Cooper & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1891 *July 7.*

JOHN CROOK (THE ELDER) . . . . . APPELLANT;

AND

I. & R. MORLEY . . . . . RESPONDENTS.

Bankruptcy—Act of Bankruptcy—Notice of Intention to Suspend Payment—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52) *sect.* 4 *sub-sect.* 1 (*h*).

A debtor sent to his creditors this letter:—"Being unable to meet my engagements as they fall due I invite your attendance at" (a specified place and time) "when I will submit a statement of my position for your consideration and decision":—

Held, affirming the decision of the Court of Appeal (24 Q. B. D. 320), that the letter would naturally induce the creditors to believe that the debtor intended to suspend payment of his debts and therefore amounted to a notice that he was "about to suspend payment of his debts" within the meaning of the Bankruptcy Act 1883 sect. 4 sub-sect. 1 (*h*) and was therefore an act of bankruptcy.

APPEAL from an order of the Court of Appeal. (1)

On the 2nd of December, 1889, a trader sent to his creditors the following circular:—

(1) 24 Q. B. D. 320.

"Belle Vue House,
"Upper Clapton,
"2nd December, 1889.

"Dear Sirs,—Being unable to meet my engagements as they fall due, I invite your attendance at the Guildhall Tavern, Gresham Street, City, on Wednesday next at 3 p.m., when I will submit a statement of my position for your consideration and decision.

"Yours obediently,
"(Signed) JOHN CROOK."

On the Wednesday, which was the 4th of December, a meeting of creditors was held, when an offer by the debtor of a composition of 2*s.* 6*d.* in the pound was refused. On the 6th of December the respondents, creditors for £108, having filed a petition for a receiving order, Mr. Registrar Linklater made a receiving order, holding that the circular was an act of bankruptcy within sect. 4, sub-sect. 1 (*h*) of the Bankruptcy Act, 1883. (1)

On appeal the Court of Appeal (Lord Esher M.R. and Bowen L.J., Fry L.J. dissenting) dismissed the appeal. Against this decision the present appeal was brought by the father and landlord of the debtor as a person aggrieved within sect. 104, sub-sect. 2 (*c*) of the Act.

July 6, 7. *Rigby* Q.C. and *Herbert Reed* (*C. A. Russell* with them) for the appellant:—

The circular letter is not within sect. 4, sub-sect. 1 (*h*) of the Act; not a notice that the debtor is about to suspend payment of his debts. It is a notice that he is unable to pay his debts as they fall due, with an invitation to the creditors to come the next day but one to discuss the situation, and decide what is best to be done. They may decide that suspension is best; but they may—and the notice is probably sent in the hope that

(1) By sect. 4, sub-sect. 1, of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) "a debtor commits an act of bankruptcy in each of the following cases. . . . .

(*f*) "If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself. . . . .

(*h*) "If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

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they will—give assistance and allow the debtor to go on trading. The Legislature intended that only certain precise and definite acts should be acts of bankruptcy. One of these is prescribed by sub-s. 1 (*f*): the filing in the Court a declaration of inability to pay debts: merely giving notice of inability is not an act of bankruptcy. What is the use of the creditors meeting to decide whether there shall be suspension, if this notice is an act of bankruptcy? For if it is an act of bankruptcy at all, it is so when issued on the 2nd of December, not on the 4th or at any other time. The meeting would be a mockery: the thing would be done, and the creditors must go home. Non-payment of debts, inability to pay debts, are not the same thing as a notice that the debtor is about to suspend. Thinking about suspending, asking for advice about suspending, are not the same thing as suspending. After the letter the debtor might honestly and properly pay individual creditors, if he were pressed, or if he acted bonâ fide without collusion. A notice that the debtor is about to suspend is quite consistent with ultimate solvency: a very different thing from a notice that he is embarrassed, cannot pay his debts as they fall due, and wants to consult his creditors whether to suspend or not. If such a letter be an act of bankruptcy no creditor can safely take a composition. No creditor could reasonably infer from it that the debtor had suspended or would certainly suspend payment. The notice is not the same as in other decided cases: see *Ex parte Oastler* (1), where a notice of inability to pay debts was held not to be equivalent to a notice that the debtor was about to suspend payment: *In re Walsh* (2); *In re Wolstenholme* (3); *In re Lamb* (4); *In re Fleming, Fraser & Co.* (5).

Finlay Q.C. (*R. Whitehead* with him) for the respondents pointed out that (*f*) in sect. 4 sub-sect. 1 was taken from similar provisions in former Bankruptcy Acts: (*h*) was new; and contended that the decision below was right for the reasons already given in the Court below.

(1) 13 Q. B. D. 471.
(2) 2 Morrell, Bkcy. R. 112.
(3) 2 Morrell, Bkcy. R. 213.
(4) 4 Morrell, Bkcy. R. 25.
(5) 60 L. T. (N.S.) 154.

Rigby Q.C. in reply.

EARL OF SELBORNE :—

My Lords, if this question were free from authority, there are some points on which my opinion would hardly be in entire accord with all that has been said in the cases referred to.

In the first place, with regard to this particular clause (*h*) of sub-sect. 1 of sect. 4 in the Bankruptcy Act of 1883, "If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts," I could not myself come to the conclusion which seems to be favoured by some observations of the very learned judge in the case of *Fleming*, that a temporary suspension, which might not be permanent, is not within the meaning of the words. To "suspend," in its natural signification, rather means something which may not be permanent than that which necessarily is so. A perpetual stoppage of payment would be a suspension and something more; but to say that the word "suspension" means nothing, in this context, but a necessarily permanent stoppage of payment, is a proposition to which I cannot agree. A stoppage of business in the ordinary course, and of the payment of debts in the ordinary course, is so serious a thing in many if not in all businesses, certainly for example in the business of a banker, that the Legislature might well consider it a sufficient reason for giving the creditors the power of treating it as an act of bankruptcy in itself, without entering into the question whether in conceivable circumstances and by conceivable methods it might not come to an end and business be resumed. I cannot but think that it would be doing violence to these words if a suspension of payments de facto, whether in circumstances which might make it possible to resume them or in circumstances which might make that impossible, were held not to be enough. That is the first point, as to which I should have a tolerably clear opinion if there were no authorities pointing the other way.

The second point is this. It is said (and I am rather under the impression that this is the main foundation of the argument before your Lordships in support of the appeal) that because under letter (*f*) it is made an act of bankruptcy "if the debtor

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files in the Court a declaration of his inability to pay his debts," therefore it would be inconsistent with that to hold a document, not so filed, which in substance declares "his inability to pay his debts," to be a "notice to creditors that he had suspended, or was about to suspend, payment of his debts." It is undoubtedly possible, that there might be a document speaking of inability to pay a man's debts in such a context and in such a manner as not to imply "that he had suspended, or that he was about to suspend, payment of his debts." But on the other hand there might be a document of which the language might amount to "a declaration of his inability to pay his debts," which, taking it with all its circumstances and in its context, would practically, and according to the common sense of mankind, be a "notice to his creditors that he had suspended, or was about to suspend, payment of his debts." And if this may be so, I can perceive no inconsistency between the two clauses, if in the one case the act of bankruptcy is constituted by the bankrupt's "filing in the Court a declaration of his inability to pay his debts," and in the other case by a notice given to his creditors in a different way. The first is not a negative and exclusive clause—it does not say that no "declaration of his inability to pay his debts" made otherwise shall operate as an act of bankruptcy; whether it does or not must depend upon the definition of other acts of bankruptcy. The debtor may do this himself without communication with any of his creditors—he may take that step intentionally to put himself in the way of being made a bankrupt. But it does not follow that something very like it may not also be an act of bankruptcy in a different way, of which his creditors may or may not take advantage. I cannot therefore attribute very much weight to any supposed implication from clause (*f*) of the sub-section, that anything which amounts to a declaration of a man's inability to pay his debts ought not to be regarded, whatever its form, context, or circumstances, as a notice to the creditors that he has suspended, or is about to suspend, payment of his debts.

My Lords, I have thought it right to say so much with regard to the construction which I should be disposed to put upon the Act apart from authority. Your Lordships are not called

upon now to enter into any other question than this, whether in the present case the debtor gave notice to his creditors that he had suspended, or was about to suspend, the payment of his debts. And there again, without reference in the first instance to any authorities, I look at the document and apply the proper test as expressed in several of the cases. I will only refer to the words of Lord Justice Bowen in the case of *Lamb* (1), where he asks the question, "What effect would the circular produce on the mind of a creditor receiving it as to the intention of the debtor with regard to his creditors?" That is the true test. I think in the case of *Wolstenholme* (2) the same thing was said by Mr. Justice Cave; and as I understood the arguments at the bar it is not denied. Then I ask, What effect would this circular naturally and properly produce upon the minds of the creditors receiving it? It is a general circular by the debtor to all his creditors. That, I think, upon the evidence, upon the evidentia rei also, your Lordships may take for granted. Well, "being unable to meet my engagements as they fall due, I invite your attendance at" a certain place, two days afterwards, "on Wednesday next, when I will submit a statement of my position for your consideration and decision." I cannot help thinking that every creditor receiving that circular must have understood that he would not do or attempt to do that which he said he was unable to do, he would not attempt to meet any of his engagements as they fell due. The very object of so writing to all the creditors is, in substance, to request them to act upon the footing that he is not going on to make payments, and that it is to be considered whether they will make any arrangement with him. Every creditor receiving that communication must have felt that it was a notice to him that he must not expect to get payment if he asked for it, but that he was desired to come to a meeting and consider what could be or ought to be done in those circumstances. Assuming, therefore, that until the letter was sent out there had been no stoppage, that letter appears to me to involve of necessity a notice that the payments would not go on in their ordinary course, at all events until after that meeting. To me that seems to be a notice that he is about to

(1) 4 Morrell, Bkcy. R. 25, at p. 28. (2) 2 Morrell, Bkcy. R. 213.

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suspend payment; and even though the time between the letter and the meeting was short, and though under some circumstances such a meeting might possibly result in the resumption of payments, I should hesitate long before I could hold that that was not notice of a suspension of payments within the meaning of the Act.

But, my Lords, it is not necessary to take so narrow a view of the matter, because looking at the letter as a whole it seems to me quite clear that, assuming the fact to be as the debtor states, it was not in contemplation that there would be any resumption of payments, and no creditor receiving it could reasonably suppose that there would be any. There might possibly be a composition with the existing creditors; and that, no doubt, was what the debtor wished for, and what he actually did propose at the meeting. But that is a different thing from a resumption of payments in the ordinary course of business; it would have been a settlement with existing creditors on the footing of not making payments in the ordinary course of business, upon the footing of suspension and not upon the footing of going on as before.

That, my Lords, is the construction which the Court below by a majority has put upon this document; and for my own part I think it was intended to be so understood, and that the man writing it would not have been acting in good faith if he had not suspended his payments. I think that in the state of things which he describes there was no actual prospect and no reasonable probability of any resumption of payments in the ordinary course of business at all.

I will not say much about the authorities. Having read the case of *In re Lamb* (1), in which Lord Justice Fry, I observe, concurred, I see no substantial distinction between that case and the present except this, that instead of calling a meeting a composition was offered by the letter. There is nothing said about suspension of payments, and the only ground for inferring the necessity for it is this, that the debtor speaks of a cause which has made him unable to pay his new creditors in full. There had been a previous composition in that case. Well,

(1) 4 Morrell, Bkcy. R. 25.

"unable to pay his new creditors in full" is language as far as the words go coming rather under clause (*f*) than under clause (*h*); but nevertheless that, coupled with an offer of composition (a better composition than was offered in this case), was held to be enough. It is not the fact that in that case he expressly said he had stopped business or gone out of business. He evidently contemplated that if the composition was accepted the creditors would like to know what he meant to do, and he says, "I do not mean to go again into business," from which undoubtedly it might be inferred that he meant to wind up his existing business upon the footing of the composition if accepted; but it does not intimate that he had stopped, unless the rest of the letter does so. In that case the Master of the Rolls made some observations upon the case of *Ex parte Oastler; In re Friedlander* (1). He said in substance that it was to him one of some difficulty, but that it might be distinguished in certain ways; and so it may be. The case of *Walsh* was decided upon that authority. But the other cases which followed, namely *In re Wolstenholme* (2) and *In re Lamb* (3), as it appears to me, go upon the same principle on which this present case has been decided. In my judgment they go upon a sound principle, and this case seems to me to be even clearer in favour of the conclusion than those cases were. Whether it is so or not is not material, if the decision in the present case is right.

On the case of *Fleming* I will say no more than this, that there are some observations of the very learned judge who delivered the judgment in that case in which I cannot entirely concur; and if I must rest my judgment in this case upon dissent from those observations, I am prepared respectfully to do so.

I therefore move your Lordships that this appeal be dismissed and the judgment below affirmed with costs.

LORD WATSON:—

My Lords, the Bankruptcy Act 1883 does not prescribe any form of words for a notice under sect. 4 (1) (*h*). It therefore appears to me that any notice will be sufficient for the purposes

(1) 13 Q. B. D. 471. (2) 2 Morrell, Bkcy. R. 213.
(3) 4 Morrell, Bkcy. R. 25.

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of sub-sect. (*h*) which is expressed in terms calculated to convey to its recipients the information that their debtor has suspended or is about to suspend payment of his debts.

A declaration of his inability to pay his debts may be made by a debtor to one or more of his creditors, in terms and under circumstances which do not suggest that he means to stop payment of his debts as they fall due. But that such a declaration may be couched in language which clearly implies that the debtor means to pay nobody in full, and to place his assets at the disposal of his creditors, does not appear to me to be doubtful. I cannot appreciate the argument that, in such a case, the declaration ought not to be treated as an act of bankruptcy under sub-sect. (*h*) of which a creditor can avail himself, because the Legislature has previously, by sub-sect. (*f*), empowered the debtor to take the benefit of the Act, by filing in Court a declaration of his insolvency.

In this case by the circular of the 2nd of December, 1889, the debtor announces to his creditors that he is unable to meet his "engagements as they fall due," which plainly imports that he can no longer continue to pay his debts in ordinary course. He then invites them to meet him two days afterwards, at an hour and place specified, "when I will submit a statement of my position for your consideration and decision." In my opinion, these words are confirmatory of the intimation conveyed in the first part of the circular, because they suggest that the sender will not be able to resume payments, or to carry on his business unless the creditors agree to accept a composition.

I think that a circular in these terms conveys a distinct assurance to the creditors who receive it, that their debtor will hold his hand and will make no payments on account of his business except such as are absolutely required for its preservation. I also think that the effect of the notice of suspension of payments is not impaired by the suggestion that he may resume payment, in the event of his creditors making arrangements which will permit of his so doing.

The judgment of the Appeal Court is, in my opinion, right. I concur in the motion proposed by the noble and learned Earl, and in all the reasons which he has assigned for it.

LORD MACNAGHTEN:—

My Lords, I entirely agree in the observations of my noble and learned friends.

LORD MORRIS:—

My Lords, I concur.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 7th July 1891.

Solicitor for appellant: *Arthur Harris.*
Solicitors for respondents: *Phelps, Sidgwick & Biddle.*

Dictum of LORD HALSBURY, L.C., . 333, *applied.* BELL *v.* GOSDEN.] 1 All E.R. 266.

[HOUSE OF LORDS.]

Dictum of LORD HERSCHELL, at p. 362, *applied.* DAVIES *v.* DE HAVILLAND AIRCRAFT CO., LTD. [1950] 2 All E.R. 582.

JOSEPH SMITH (PAUPER) . . APPELLANT;

AND

CHARLES BAKER & SONS . . . . . RESPONDENTS.

Applied. DAVIES *v.* DE HAVILLAND AIRCRAFT CO. LD. [1951] 1 K. B. 50

Negligence—Master and Servant—Employer and Workman—Defect in System—Risk voluntarily incurred—Maxim "Volenti non fit Injuria"—Employers Liability Act 1880 (43 *&* 44 *Vict. c.* 42)*—Practice—Appeal from County Court—Point not raised at Trial—Condition Precedent—County Courts Act* 1888 (51 *&* 52 *Vict. c.* 43) *s.* 120.

When a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department over which he has no control—the danger being created or enhanced by the negligence of the employer—the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to shew that he has undertaken the risk so as to make the maxim "Volenti non fit injuria" applicable in case of injury. The question whether he has so undertaken the risk is one of fact and not of law. And this is so both at common law and in cases arising under the Employers Liability Act 1880.

The plaintiff was employed by railway contractors to drill holes in a rock cutting near a crane worked by men in the employ of the contractors. The crane lifted stones and at times swung them over the plaintiff's head without warning. The plaintiff was fully aware of the danger to which he was exposed by thus working near the crane without any warning being given, and had been thus employed for months. A stone having fallen

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from the crane and injured the plaintiff, he sued his employers in the County Court under the Employers Liability Act 1880. The jury found (1) that the machinery for lifting the stone, taken as a whole, was not reasonably fit for the purpose for which it was applied; (2) that the omission to supply special means of warning was a defect in the ways, works, machinery and plant; (3) that the employers (or some person engaged by them to look after the condition of the works, &c.) were guilty of negligence in not remedying the defect; (4) that the plaintiff was not guilty of contributory negligence; (5) that he did not voluntarily undertake a risky employment with a knowledge of its risks; and returned a verdict for the plaintiff for damages. Application having been made to enter judgment for the defendants on the ground that the case ought not to have gone to the jury, the plaintiff having admitted that he knew of the risk and voluntarily incurred it:—

Held, reversing the decision of the Court of Appeal (Lord Bramwell dissenting), that the mere fact that the plaintiff undertook and continued in the employment with full knowledge and understanding of the danger arising from the systematic neglect to give warning did not preclude him from recovering; that the evidence would justify a finding that the plaintiff did not voluntarily undertake the risk of injury; that the maxim "Volenti non fit injuria" did not apply; and that the action was maintainable:

Held, contrà by Lord Bramwell, that there was no evidence to justify the 5th finding of the jury; that the plaintiff having voluntarily undertaken the work with knowledge of the risk the maxim "Volenti non fit injuria" applied; and that the action was not maintainable.

Sword v. *Cameron* (1 Sc. Sess. Cas. 2nd Series, 493) approved.

Thomas v. *Quartermaine* (18 Q. B. D. 685) commented on.

Under the provisions of sect. 120 and the following clauses of the County Courts Act 1888 (51 & 52 Vict. c. 43) there is no right of appeal from a county court except upon a question of law raised and submitted to the county court judge at the trial.

Clarkson v. *Musgrave* (9 Q. B. D. 386) approved.

APPEAL from a decision of the Court of Appeal.

The appeal arose in an action brought by the appellant in the County Court of Yorkshire, held at Halifax, to recover damages against the respondents (who were railway contractors) for injuries sustained by him whilst in their employment. The appellant had been working for the respondents on the Halifax High Level Railway for some months prior to the day on which he received his injuries. The duties assigned to him when he first entered their employment were to fill skips or crates with stones, which were to be lifted by a steam crane, in order to be put into waggons. He was next engaged in slinging stones on to the

crane, and about two months before the accident he was set to work a hammer and drill with two other servants of the respondents, he working the drill whilst they worked the hammer. On the day of the accident he was sent with two others to drill a hole in the rock in a cutting. Whilst they were thus employed, stones were being lifted from the cutting, which was seventeen or eighteen feet deep. The crane was on the top of the cutting, near the edge. In slinging a stone a chain was put round it and a hook hitched into one of the links. To this chain the chain from the crane was fastened. When the stones were clear of the bank the arm of the crane was jibbed in the one or the other direction, according to the position of the waggons into which the stone was to be loaded. If it was jibbed in one direction it passed over the place where the appellant was working. Whilst he was working the drill, a stone in the course of being lifted fell upon him, and caused serious injuries. No warning was given that the stone was to be jibbed in that direction. The plaintiff in his evidence stated that the men were jibbing over his head, that whenever he saw them he got out of the way, but at the time that the stone fell upon him he was working the drill and so did not see the stone above. One of his fellow-workmen had in the plaintiff's hearing previously complained to the ganger of the danger of slinging stones over their heads, and the plaintiff himself had told the crane-driver that it was not safe. In cross-examination the plaintiff stated that he was a navvy, and accustomed to this particular work for six or seven years. He had been at it long enough to know that the work was dangerous; he had been at the same class of work in the same cutting when they were jibbing overhead every day; he was doing that safely for four or five months. Sometimes he could see the stones being craned up above him; when he saw them he got out of the way. At the close of the plaintiff's case the defendants' counsel submitted that the plaintiff must be non-suited on his own admission as to his knowledge of the risk, citing *Thomas* v. *Quartermaine* (1). The learned judge (Judge Snagge), however, refused to non-suit. The only witness called for the defendants was Hanson, the ganger, who was superintending the work on the

(1) 18 Q. B. D. 685.

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day of the accident, and under whose orders the plaintiff was. Hanson stated that they had put the sling-chain on to the stone in the ordinary way, but no explanation was given or suggestion made as to what was the cause of the disaster. He said the rule at the works was that every one should look out for himself; it was part of the plaintiff's employment to look out; the men ought to have stopped work while the stone was being jibbed round; that would be the safe way; he told the men to get out of the way. After the defendants' case closed the learned judge left several questions to the jury, which were answered by them as follows:—

1.—*Q.* Was the machinery for lifting the stone from the cutting, taken as a whole, reasonably fit for the purpose for which it was applied?—*A.* No.

2.—*Q.* Was the omission to supply special means of warning when the stones were being jibbed a defect in the ways, works, machinery and plant?—*A.* Yes.

3.—*Q.* If so, were the employers (or some person engaged by them to look after the condition of the works, &c.) guilty of negligence in not remedying that defect?—*A.* Yes.

4.—*Q.* Was the plaintiff guilty of contributory negligence?—*A.* No.

5.—*Q.* Did the plaintiff voluntarily undertake a risky employment with a knowledge of its risks?—*A.* No.

6.—*Q.* Amount of damages (if any)?—*A.* £100.

Application was made on behalf of the defendants to have judgment entered for them, notwithstanding the findings of the jury, on the ground that the case ought not to have been allowed to go to them, the plaintiff having admitted that he knew of the risk and voluntarily incurred it. The learned judge directed judgment to be entered for the plaintiff for £100, the amount of damage assessed by the jury. Notice of a motion to set aside the judgment and to have judgment entered for the defendants was afterwards given in the Queen's Bench Division. The grounds stated in that notice, so far as are now material, were as follows:—

"That the case ought not to have been allowed by the judge to go to the jury, the plaintiff having admitted that he knew of the risk which caused his injury, and voluntarily incurred it.

"That on the plaintiff's own admissions, made on the trial of the action, a non-suit ought to have been entered by the judge.

"That the entry of the said judgment for the plaintiff was and is bad in law, and that the judge ought not to have entered judgment for the plaintiff."

The Divisional Court (Huddleston B. and Wills J.), before whom the appeal came, thinking that there was a conflict between the decisions of the Court of Appeal in the cases of *Yarmouth* v. *France* (1) and *Thomas* v. *Quartermaine* (2), which they were unable to reconcile, and which it was desirable that the Court of Appeal should explain, dismissed the appeal, at the same time granting leave to appeal.

The Court of Appeal (Lord Coleridge C.J., Lindley and Lopes L.JJ.) reversed the judgment of the Court below and entered judgment for the defendants, mainly, or it may be said exclusively, on the ground that there was no evidence of negligence on the part of the defendants, although the Lord Chief Justice expressed an opinion that the judgment of the county court judge ought to be set aside on another ground also; namely, that the plaintiff had been engaged to perform a dangerous operation and took the risk of the operation he was so called upon to perform.

1890. Dec. 1, 2, 4. *Yarborough Anderson* (*T. F. Byrne* with him) for the appellant:—

The point on which the Court of Appeal decided was not and is not open to the defendants, for it was not taken at the trial. The statute strictly limits the appeal to a point of law taken at the trial of which the judge is asked to take a note: see 51 & 52 Vict. c. 43 s. 120, and *Clarkson* v. *Musgrave* (3), decided on sect. 6 of the County Courts Act of 1875, which ran in similar terms. The same principle has been applied by this House to actions in the High Court: *The Tasmania* (4); *MacDougall* v. *Knight* (5). Moreover no such point was even suggested in the notice of appeal to the Divisional Court or in that to the Court of Appeal.

(1) 19 Q. B. D. 647.
(2) 18 Q. B. D. 685.
(3) 9 Q. B. D. 386.
(4) 15 App. Cas. 223.
(5) 14 App. Cas. 194.

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But, assuming that point to be open to the defendants, there was evidence of negligence for the jury. A crane in fit condition and properly worked does not drop stones; the fact of a stone falling is in the absence of explanation evidence of negligence: *Scott* v. *London Dock Company* (1); *Byrne* v. *Boadle* (2). The case is very similar to *Sword* v. *Cameron* (3), which was approved by Lord Cranworth in *Bartonshill Coal Company* v. *Reid* (4) and by Lord Chancellor Chelmsford in *Bartonshill Coal Company* v. *McGuire* (5). There as here the defect was in the system. There the time allowed the men to escape from the blasting was not enough. Here there was no one to give warning when the crane moved over the plaintiff, and while occupied in drilling he could not watch the crane himself. There as here the workman was well aware of the danger: yet the maxim "Volenti non fit injuria" did not apply. Those cases establish that at common law—as well in Scotland as in England—a defect in the system which makes the employment more dangerous than it otherwise would be renders the employer liable, though the workman knows of the danger.

[LORD WATSON referred to the judgment of Lord Wensleydale in *Weems* v. *Mathieson* (6).]

There was quite enough to bring the case within the Employers Liability Act. Not only was there a defect in the system, that is to say in the ways, works, machinery and plant, but the ganger who was intrusted by the employer with the superintendence of the work admitted the danger, and was negligent in not seeing that warning was given. Either the crane ought not to have been moved on the side where the plaintiff was working or he ought to have been warned. The findings of the jury include negligence in the system and the working. A man who undertakes an employment intrinsically dangerous voluntarily runs the risk, but the maxim does not apply to a case where there is no danger if the machinery is fit and is properly used. A man does not undertake to run the risk of negligence in some one else. Undertaking an employment with exposure to danger

(1) 3 H. & C. 596.
(2) 2 H. & C. 722.
(3) 1 Sc. Sess. Cas. 2nd Series, 493.
(4) 3 Macq. 266, 289.
(5) Ibid. 300, 310.
(6) 4 Macq. at p. 227.

is one thing; undertaking the risk so that in case of injury there shall be no right of action is another. The fallacy which underlies the reasoning in *Thomas* v. *Quartermaine* (1) is in confusing these two things. *Yarmouth* v. *France* (2) is a strong authority for the plaintiff.

E. Tindal Atkinson Q.C. and *W. S. Robson* for the respondents:—

The effect of the County Courts Act and the authority of *Clarkson* v. *Musgrave* (1) are not disputed; but the point that there was no evidence for the jury of negligence or of any breach of duty was really included in the objection taken at the trial. This action is entirely under the Employers Liability Act, and must be founded on some breach of duty imposed by that Act, and the principles of the common law do not apply except so far as they are incorporated in the Act. No breach of duty imposed by the Act was shewn in the evidence, or even suggested in the claim or particulars. No defect in the machinery was suggested; the only negligence pointed at was in not giving warning. And there was no evidence to justify the first three findings of the jury. Those answers are not conclusive. To satisfy the Employers Liability Act 1880 (43 & 44 Vict. c. 42) s. 2, sub-s. 1, the jury ought to have found that the defect arose from the negligence of the employer or of some person intrusted by him with the duty of seeing that the machinery, &c., was in proper condition. And of that there was no evidence. The ganger proved that the men had to take care of themselves and get out of the way, and that he had had to threaten to discharge a man for not doing so. The plaintiff admitted he knew he could not watch the crane. The only defect found by the jury was the omission to give warning, and that defect (if it was one) the plaintiff knew of, and voluntarily undertook to run the risk. No evidence was given of any other defect or of any negligence in slinging the stone or working the crane or otherwise. The jury probably meant that the machinery, that is the system, was defective unless warning was given; but that gives the plaintiff no advantage. He either originally contracted to run

(1) 18 Q. B. D. 685. (2) 19 Q. B. D. 647. (3) 9 Q. B. D. 386.

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the risk or continued in his employment after knowledge that there was no one to give warning. The maxim "Volenti non fit injuria" applies as much to cases outside a contract—visitors at a house for instance—as to contracts. Here it is a case of contracting to run the risk. A man who with knowledge contracts to work under a defective system—e.g. a shaky roof—cannot complain if the roof falls. The authorities do not make any such distinction as to the application of the maxim as has been suggested for the appellant. In *Skipp* v. *Eastern Counties Railway Company* (1) the injury arose from the company failing to keep servants enough, and the maxim was applied. In *Clarke* v. *Holmes* (2) the maxim was not applied, but only because the master had promised and had failed to remedy the defect. *Woodley* v. *Metropolitan District Railway Company* (3) exactly meets the present case and clearly negatives the distinction attempted to be set up, for the danger was not in the work the plaintiff was doing, but arose from the failure of other persons to give warning, and the maxim was nevertheless applied. The present case is indeed stronger for it is one of contract, which that case was not. The decision in *Thomas* v. *Quartermaine* (4), and especially the judgment of Bowen L.J., shews that the maxim is applicable to a case like the present. There is nothing in that case or in *Yarmouth* v. *France* (5) to support the appellant's contention. See also *Membery* v. *Great Western Railway Company* (6).

Y. Anderson in reply:—

The first finding includes the application and use of the machinery and covers the working of the crane. Cranes properly worked do not let stones fall: probably the stone was cracked or for some reason unfit to be slung in a chain. The ganger was superintending the whole of the works, and ought to have seen that the crane was properly worked and that warning was given. There was therefore evidence for the jury of liability under the Act. As to the maxim, the plaintiff's first employ-

(1) 9 Ex. 223.
(2) 7 H. & N. 937.
(3) 2 Ex. D. 384.
(4) 18 Q. B. D. 685, 695.
(5) 19 Q. B. D. 647.
(6) 14 App. Cas. 179.

ment was not to do this work, and there is no evidence of any new contract to run any risk. The question whether the plaintiff was volens is for the jury: per Lindley J. in *Yarmouth* v. *France* (1).

The House took time for consideration.

1891. July 21. LORD HALSBURY L.C.:—

My Lords, this was an action originally tried in the county court, and it is very important to bear in mind that only a limited appeal is allowed by law in actions so tried. There is no power to review the decision of fact arrived at in the county court by any other tribunal than the county court itself. A matter of law can be made the subject of appeal, but then only when the point has been raised at the trial before the learned judge. That question was decided in *Rhodes* v. *Liverpool Commercial Investment Company* (2). In *Seymour* v. *Coulson* (3) the principle was affirmed that the point of law must be taken; and finally in *Clarkson* v. *Musgrave* (4), where all the cases were reviewed, it was established (and I think has been accepted ever since) that the raising of the point of law at the trial is a condition precedent to any appeal from the decision of the county court.

My Lords, I think there are good reasons for the enactment which has so limited an appeal, and in truth even where written pleadings render such precautions as the statute has enforced in the county court less necessary, the same precaution has been constantly enforced where applications for a new trial have been made in the Superior Courts. It is obvious that it would be unjust to one of the parties if the other could lie by and afterwards, having failed on the contention that he in fact set up, be permitted to rely on some other point not suggested at the trial, but which if it had been suggested might have been answered by evidence: see *McDougall* v. *Knight* (5).

Now, the first question therefore to consider here is, what

(1) 19 Q. B. D. at p. 661.
(2) 4 C. P. D. 425.
(3) 5 Q. B. D. 359.
(4) 9 Q. B. D. 386.
(5) 14 App. Cas. 194.

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question was in fact raised before the county court judge in this case, and consequently what question is open to your Lordships to consider on this appeal. The action was an action in which the plaintiff sued his employers for injuries sustained while in the course of working in their employment. He was employed in working at a drill while two other fellow-workmen were engaged in striking with a hammer at the drill, which he was employed to hold in the proper position. The nature of the employment was one which involved his attention being fixed upon the drill that it might be held in the proper position when receiving alternate strokes from the hammers wielded by his fellow-workmen. The place where he was employed was in a cutting, and in his immediate proximity another set of workmen were engaged in working in the cutting and taking stones out of it. For the purpose of this operation a steam crane was used, and occasionally, though not invariably, the stones lifted by the crane were swung over the place where the plaintiff was employed, and on the occasion which gave rise to the action a stone was swung over the plaintiff, and from some cause not explained and not attempted to be explained, the stone slipped from the crane, fell upon the plaintiff, and did him serious injury.

My Lords, the first point attempted to be argued at your Lordships' Bar was that there was no evidence to go to the jury of any negligence. Now, it is manifest upon the notes of the learned county court judge that no such point was taken at the trial, and it is therefore perfectly intelligible why no evidence is referred to with respect either to the crane, the manner of slinging the stone, or the mode in which the stone was fastened. Each of these things would have been material to consider if any such question had in fact been raised. I will not myself suggest, or even conjecture, what was the cause of the stone falling, or what precautions ought properly to have been taken against such a contingency. What is, or is not, negligence under such circumstances may depend upon a variety of considerations. If, for instance, the only result of not properly fastening a stone may be that it will fall back again, and so necessitate a repeating of the operation, there may be no

negligence in not taking great care in so fastening the stone as to render such an accident improbable, if not impossible. It may be simply a question of whether the extra pains taken in fastening the stone may not be an unnecessary waste of time and care, and those engaged in the operation may well be justified in risking the possibility of the stone falling. But if the stone is to be lifted under such circumstances, or, when lifted, swung over a workman beneath it, totally different considerations arise. And I think the unexplained and unaccounted for fact, that the stone was being lifted over a workman, and that it fell and did him damage, would be evidence for a jury to consider of negligence in the person responsible for the operation. But whether that was so or not, the question does not here arise.

The objection raised, and the only objection raised, to the plaintiff's right to recover was that he had voluntarily undertaken the risk. That is the question, and the only question, which any of the Courts, except the county court itself, had jurisdiction to deal with. Now, the facts upon which that question depends are given by the plaintiff himself in his evidence. Speaking of the operation of slinging the stones over the heads of the workmen, he said himself that it was not safe, and that whenever he had sufficient warning, or saw it, he got out of the way. The ganger told the workmen employed to get out of the way of the stones which were being slung. The plaintiff said he had been long enough at the work to know that it was dangerous, and another fellow-workman in his hearing complained that it was a dangerous practice.

My Lords, giving full effect to these admissions, upon which the whole case for the defendants depends, it appears to me that the utmost that they prove is that in the course of the work it did occasionally happen that stones were slung in this fashion over workmen's heads, that the plaintiff knew this, and believed it to be dangerous, and whenever he could he got out of the way. The question of law that seems to be in debate is whether upon these facts, and on an occasion when the very form of his employment prevented him looking out for himself, he consented to undergo this particular risk, and so disentitled himself to

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recover when a stone was negligently slung over his head or negligently permitted to fall on him and do him injury.

My Lords, I am of opinion that the application of the maxim "Volenti non fit injuria" is not warranted by these facts. I do not think the plaintiff did consent at all. His attention was fixed upon a drill, and while, therefore, he was unable to take precautions himself, a stone was negligently slung over his head without due precautions against its being permitted to fall. My Lords, I emphasize the word "negligently" here, because, with all respect, some of the judgments below appear to me to alternate between the question whether the plaintiff consented to the risk, and the question of whether there was any evidence of negligence to go to the jury, without definitely relying on either proposition.

Now, I say that here evidence of negligence must by the form of procedure below be admitted to have been given, and the sole question to be dealt with is that with which I am now dealing. For my own part, I think that a person who relies on the maxim must shew a consent to the particular thing done. Of course, I do not mean to deny that a consent to the particular thing may be inferred from the course of conduct, as well as proved by express consent; but if I were to apply my proposition to the particular facts of this case, I do not believe that the plaintiff ever did or would have consented to the particular act done under the particular circumstances. He would have said, "I cannot look out for myself at present. You are employing me in a form of employment in which I have not the ordinary means of looking out for myself; I must attend to my drill. If you will not give me warning when the stone is going to be slung, at all events let me look out for myself, and do not place me under a crane which is lifting heavy stones over my head when you keep my attention fixed upon an operation which prevents me looking out for myself."

It appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim, "Volenti non fit injuria." I think they must go to the extent of saying that wherever a person knows there is a risk of injury to himself, he debars himself from any right of complaint

if an injury should happen to him in doing anything which involves that risk. For this purpose, and in order to test this proposition, we have nothing to do with the relation of employer and employed. The maxim in its application in the law is not so limited; but where it applies, it applies equally to a stranger as to any one else; and if applicable to the extent that is now insisted on, no person ever ought to have been awarded damages for being run over in London streets; for no one (at all events some years ago, before the admirable police regulations of later years) could have crossed London streets without knowing that there was a risk of being run over.

It is, of course, impossible to maintain a proposition so wide as is involved in the example I have just given; and in both *Thomas* v. *Quartermaine* (1) and in *Yarmouth* v. *France* (2), it has been taken for granted that mere knowledge of the risk does not necessarily involve consent to the risk. Bowen L.J. carefully points out in the earlier case (*Thomas* v. *Quartermaine* (1)) that the maxim is not "Scienti non fit injuria," but "Volenti non fit injuria." And Lindley L.J., in quoting Bowen L.J.'s distinction with approval, adds (3): "The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff." And again, Lindley L.J. says: "If in any case it can be shewn as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases mentioned in the Act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot in my opinion be held, as a matter of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it." Again, Lindley L.J. says: "If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk

(1) 18 Q. B. D. 685. (2) 19 Q. B. D. 647.
(3) 19 Q. B. D. 660.

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and had not acted voluntarily in the sense of having taken the risk upon himself."

I am of opinion myself, that in order to defeat a plaintiff's right by the application of the maxim relied on, who would otherwise be entitled to recover, the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself. It is manifest that if the proposition which I have just enunciated be applied to this case, the maxim could here have no application. So far from consenting, the plaintiff did not even know of the particular operation that was being performed over his head until the injury happened to him, and consent, therefore, was out of the question.

As I have intimated before, I do not deny that a particular consent may be inferred from a general course of conduct. Every sailor who mounts the rigging of a ship knows and appreciates the risk he is encountering. The act is his own, and he cannot be said not to consent to the thing which he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself, and where, therefore, the application of the maxim, "Volenti non fit injuria," is completely justified.

I have hitherto treated the question apart from the specific findings by the jury. But I am not disposed to think that those findings were not justified upon the evidence presented. They found that the machinery for lifting the stone from the cutting was not reasonably fit for the purpose for which it was applied, *taken as a whole.* I think the jury meant—and if they did so mean, I am of opinion that they were right—that, looking to the risk incurred by the men working below and to the possibility of the crane when worked (as in fact it was worked) letting stones fall, the machinery was not reasonably fit for the purpose for which it was applied, that is to say, not reasonably fit for securing that stones should not fall from it when slung over men's heads. And further, that if with such machinery the stones were being slung over men's heads, special warning ought to have been supplied to the men imperilled by such an operation, and that the employers were guilty of negligence in not

remedying *such* a mode of working *such* machinery under *such* conditions of work.

I think the cases cited at your Lordships' Bar of *Sword* v. *Cameron* (1), and the *Bartonshill Coal Company* v. *McGuire* (2), established conclusively the point for which they were cited, that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employers' Liability Act. In *Sword* v. *Cameron* (1) it could hardly be doubted that the quarryman who was injured by the explosion of the blast in the quarry was perfectly aware of the risk; but nevertheless he was held entitled to recover notwithstanding that knowledge.

It seems to me that in the present case the right of the plaintiff to recover is far more clear than in *Sword* v. *Cameron* (1). The interval given to the quarryman to seek shelter was the usual and ordinary one. But suppose in that case the employer had employed the quarryman to do something which by the very form of the employment prevented his hearing the signal which gave him warning to retreat? In this case, as I have pointed out, there was no warning and no signal, but the employer or his representative employed the plaintiff under such circumstances as disabled him from using his eyes for protecting himself against the risk.

It seems to me, therefore, that this is a case in which the plaintiff is entitled to recover, and I therefore move your Lordships that the judgment of the Court of Appeal be reversed, and the judgment of the county court judge restored.

LORD BRAMWELL:—

My Lords, with the leave of my noble and learned friend, Lord Watson, I address your Lordships now.

If this case came before me in the first instance, without any entanglement of statement of claim, finding of a jury, question of objections taken, and former decisions, I should hold it to be the plainest possible, and that the plaintiff had no claim in law or morality. I say this, not from any prejudice against the Employers' Liability Act. I am not certain it would not be a

(1) 1 Sc. Sess. Cas. 2nd Series, 493. (2) 3 Macq. 300.

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good thing to give a person injured as the plaintiff was a right to compensation, perhaps from the State, even where there was no blame in the master; even where there was blame in the servant. Men would not wilfully injure themselves, and then compensation would be a part of the cost of the work. But we have to deal with the law as it is.

Now, what are the facts of this case? The plaintiff was employed by the defendants. The defendants were engaged in making a cutting for a railway, and of course had to remove what they excavated, and were doing so by putting the stones in a crate or in a sling, and raising them by a crane to the bank. The crane was turned so that the stones and sling passed over parts of the cutting, and therefore, over persons who might be standing or working on those parts. A stone so slung, and so being lifted, fell, or the parts of it fell, on the plaintiff, and most grievously hurt him. The plaintiff well knew of the possibility of such an accident. Those who were at work with him moved out of the way and escaped. The plaintiff did not, not knowing, as he says, of that particular movement of the crane. Now, how are the defendants to blame? There is no evidence that the crane was not the ordinary crane used for such purposes. No one says it was not. There is no evidence that lifting the stones as they were lifted—that is, by slinging them and jibbing the crane—was not the ordinary and reasonable way of working. No one says it was not. There is no evidence that the particular stone was improperly slung. No one says it was. I have no objection to "res ipsa loquitur." I believe I was one of the first, if not the first, to use it in some cases about fifteen years ago; but it does not apply here. At least, I cannot use it. I know that bales and barrels do not move and fall of their own accord. I do not know that stones slung carefully will not come apart and fall. My notion is that they will. I think I have often lifted up a piece of coal and found that the part I had hold of remained in the tongs and the rest broke away. I should think there might be some cleavage, I think it is called, which would prevent the parts holding together. This may be ignorance on my part. But if it is, it should have been removed by evidence, and there is none. Lord Coleridge and

Lindley L.J. are in the same state of ignorance, if it is one. Further, this is a claim which can only be maintained by virtue of the Employers' Liability Act. If there was negligence or unskilfulness in the slinging of the stone or working of the crane, it was not by any one in authority within that Act. Lastly, the plaintiff knew of the danger. Not of this particular stone, but generally that such stones might fall; yet he remained while it was passing over his head, not knowing, as he says, of this particular stone, but knowing that that kind of work was going on, and not looking out. His fellow-workmen looked out, did know, and got out of the way. There was no one to warn the plaintiff. No one says that it was the practice that there should be, and the plaintiff knew there was no one. This is the case pure and simple.

Now, let us see what is the case that comes before us. The particulars of claim say that "a stone or stones slipped from the crane chain and struck the plaintiff, by reason of the negligence of the defendants, they having failed to afford means of warning the plaintiff of the danger of continuing his work during the said craning operation, *or* of preventing the said stone or stones striking against him." The meaning of this is not certain. I think it is a complaint of want of "means of warning," whereby the plaintiff could prevent the stone striking against him. But it may be that it means a negligence in the slinging. So be it. If it is, there is no evidence of it. Then there is a claim that the accident was caused by the negligence of the foreman, whom the plaintiff was bound to and did obey. Of this there is no evidence.

Now, as to the evidence. I think it to the credit of the plaintiff that it was truthful, as it seems to me, substantially. He describes the operation, and he says that one of his fellow-workmen told the then ganger that it "was not safe to allow them to jib the stones over our heads"; that whenever he and his fellow-workmen saw them they got out of the way. He says he had been long enough at the work to know it was dangerous; that he heard another fellow-workman say to the ganger that it was dangerous; that he, the plaintiff, thought so, and told the crane worker so; that if they had stood looking

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at the craning they would have been sent to the office, that is, discharged. One of the plaintiff's witnesses, West, says it was dangerous, and he so told the ganger; that he got out of the way when the stones were being jibbed; that he knew they had to look out for themselves, for there was no one to warn them. The ganger, called for the defendants, says he told them to get out of the way; evidently meaning step aside, not leave their work.

The following questions were left to the jury. 1. Was the machinery for lifting the stone, taken as a whole, reasonably fit for the purpose to which it was applied? I am sorry to say that the jury answered, "No." 2. Was the omission to supply means of warning a defect in the ways, works, machinery, and plant? The jury say, "Yes." So that a man standing on the edge, as West says, would be part of the "plant"! 3. If so, the jury say the defendants were guilty of negligence in not remedying that defect. Well, "if so," it is true that they were negligent or wilful, if they knew of it, as I suppose they did. 4. Was the plaintiff guilty of contributory negligence? The jury say, "No." Well, I incline to think so. It was not negligence on his part; he did it wilfully. Except, indeed, that he was negligent in not doing what his mates did, i.e., step on one side when the stone was coming, and not looking out for it. 5. Did the plaintiff voluntarily undertake a risky employment with knowledge of its risks? The jury say, "No." I wonder what they meant. Indeed, the question is wonderful. The answer, to make it favourable to the plaintiff, is necessarily negative, a negative pregnant of one affirmative and another negative—twins. It might mean that the plaintiff did not voluntarily undertake the employment, or that it was not risky, or that he had not a knowledge of its risks. In any and every sense it is untrue, and, I think, not to the credit of the jury who gave it. On this the defendants' advocate applied for judgment, the plaintiff having admitted that he knew of the risk, and voluntarily incurred it. Judgment, however, was given for the plaintiff.

There was an appeal to the Queen's Bench Division, that the case ought not to have been allowed to go the jury; because the plaintiff, having admitted he knew of the risk which caused

the injury, voluntarily incurred it. The Court considered themselves bound or fettered by some decision of the Court of Appeal, which that Court had better solve, and dismissed the appeal, but very clearly indicated that their own opinion was the other way. Wills J. said, "If I were an authority, I should have said that the evidence is all one way on the point of the man voluntarily accepting the risk, and I cannot draw the distinction between the man accepting the risk in the first instance, and his continuing in the employment under circumstances which brought the risk to his mind." Wills J. shews his dissent from the case of *Yarmouth* v. *France* (1).

From this judgment there was an appeal on the same ground to the Court of Appeal, who reversed the judgment. Lord Coleridge says: "This case is clearly within the decisions that have been pronounced in the Court below, and in this Court, in which it has been held, and I think most properly held, that a person who is engaged to perform a dangerous operation takes the risk of the operation of the work that he is called on to perform. As to that, there never was any doubt before the Employers' Liability Act, nor since." I think that is a very neat and forcible way of putting it. He gives judgment for the defendants also on another ground, viz., that there was no evidence of negligence in the defendants causing the accident. There certainly was none; but it is said this was not open to the defendants. Lindley L.J. gives judgment the same way; his judgment is of extra importance, because it shews that *Yarmouth* v. *France* (1), relied on for the plaintiff, is not, in the opinion of Lindley L.J. who was party to it, against the defendants. His Lordship says: "If people will enter into dangerous employment, they do so without making other people liable for injuries they sustain." I cite also his Lordship's opinion to justify my own, that "the jury were led away by sympathy, for they found matters that were not in the least warranted by the evidence. I think there was no evidence of negligence at all." Lopes L.J. says the same.

The case is now before your Lordships, and there cannot be a doubt how it ought to be decided, unless, by some miscarriage

(1) 19 Q. B. D. 647.

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of jury or judge or counsel, the defendants are to be made liable where they are absolutely free from legal blame.

In the course of the argument I said that the maxim "Volenti non fit injuria" did not apply to a case of negligence; that a person never was volens that he should be injured by negligence—at least, unless he specially agreed to it; I think so still. The maxim applies where, knowing the danger or risk, the man is volens to undertake the work. And I think the maxim does apply here; for the complaint in the statement of claim (the only thing proved) was, that there was no one to give notice when the stone was passing over where the plaintiff was at work. If this was wrong, the plaintiff knew of it and voluntarily undertook the risk. The case is different to a street accident, where a man is injured by the act of one between whom and him there is no relation. It is not dangerous apart from negligent driving. There is indeed a likeness. I admit that personal negligence in the master would make him liable; so also the use of dangerous plant not known to the servant.

If this is a maxim, is it any the worse? What are maxims but the expression of that which good sense has made a rule? It is a rule of good sense that if a man voluntarily undertakes a risk for a reward which is adequate to induce him, he shall not, if he suffers from the risk, have a compensation for which he did not stipulate. He can, if he chooses, say, "I will undertake the risk for so much, and if hurt, you must give me so much more, or an equivalent for the hurt." But drop the maxim. Treat it as a question of bargain. The plaintiff here thought the pay worth the risk, and did not bargain for a compensation if hurt: in effect, he undertook the work, with its risks, for his wages and no more. He says so. Suppose he had said, "If I am to run this risk, you must give me 6*s.* a day and not 5*s.*," and the master agreed, would he in reason have a claim if he got hurt? Clearly not. What difference is there if the master says, "No; I will only give the 5*s.*"? None. I am ashamed to argue it. I refer to the judgments of Bowen and Fry L.JJ. in *Thomas* v. *Quartermaine* (1). It is not necessary to discuss *Yarmouth* v. *France* (2), for Lindley L.J., who was party to that judgment, is

(1) 18 Q. B. D. 685. (2) 19 Q. B. D. 647.

also a party to that now appealed from, and thinks that whatever that decided, it decided nothing inconsistent with the judgment now under consideration. I respectfully express my dissent from that judgment in *Yarmouth* v. *France* (1), and my concurrence with the observations of Wills J. on it. The fourth question ought not to have been left to the jury. The plaintiff could not make a case without shewing his agreement with the defendants to do work involving this risk. If he had said he did not know of this practice of slinging the stones and passing them over the heads of other workmen, it would have been false, but a question for the jury. If left to the jury, technically the judge ought to have directed them on the confession of the plaintiff to find for the defendants; a verdict the other way would have been perverse. I have always understood that when either party confesses to that which entitles the other side to a verdict, the judge may so direct it as he ought to have done here. Would it not be absurd to say, I ask you to say whether so and so is the case? The plaintiff admits it is.

There is a confusion in the case. "Volenti non fit injuria," say the defendants. The plaintiff answers, "But you were negligent." The defendants reply, "No, we were not." The plaintiff rejoins, "You did not take that objection at the trial." I do not agree. But supposing it was so, what has that got to do with the question? The plaintiff advances this proposition, "You cannot rely on 'Volenti non fit injuria,' because that does not apply to a case of negligence. A man may be volens to encounter the natural dangers of a business, but not those superadded by negligence." I agree. But the plaintiff's proposition involves that he must make out negligence to take the case out of the rule. Assume that the defendants at the trial only took the objection, "Volenti non fit injuria," that meant, "You were willing to run the ordinary risks; if you say there was anything extraordinary, shew it." There certainly was none, for the reasons I have given. Why are we to say that the danger was enhanced when there is positively no evidence of it? What was the danger the plaintiff was willing to run? This: having stones slung in a particular way jibbed over his head, with the risk of

(1) 19 Q. B. D. 647.

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their falling from bad slinging or other cause, and nobody to warn him when the jibbing caused the stone to come over him. How did the defendants enhance this? Did they cause the stone to be slung dangerously? As to no warning, the plaintiff knew he would have none. The plaintiff must have known that, if not inevitable or probable, the accident was possible. It is argued that there was a breach of duty in the defendants. What? What duty? Did the defendants ever undertake with the plaintiff that they would conduct their works otherwise than as they did that day? There is no such thing as abstract duty. Is there any evidence that the works were not being conducted as they were when the plaintiff entered the defendants' service? It is not necessary to consider whether this action would lie if the work was more dangerous after the employment had been entered into, and the workman knew it. It was indeed once held that if an obstruction was put before a cabman's stable he might run into it, and, if damaged, recover. I think the right course for the workman would be to say, "I entered your employment with a certain amount of risk, or with no risk, and you undertook to employ me. You have made it dangerous; that is a breach of your engagement, and I sue you." But it is immaterial in this case, for the work was unchanged in character, and was the same when he entered the service as when he was hurt. Besides, in these services every week there is a new engagement, and, therefore, his last week's work was under a contract made by the plaintiff, with full knowledge of the risk. If we suppose the contract was from week to week, till determined by notice, surely he is volens if he does not give the notice.

It is said that to hold the plaintiff is not to recover is to hold that a master may carry on his work in a dangerous way and damage his servant. I do so hold, if the servant is foolish enough to agree to it. This sounds very cruel. But do not people go to see dangerous sports? Acrobats daily incur fearful dangers, lion-tamers and the like. Let us hold to the law. If we want to be charitable, gratify ourselves out of our own pockets.

As to the authorities. It is a little amusing that Lindley L.J. should be cited to shew that his very clear judgment in this case was wrong. As to the opinion of Lord Cranworth, I hold it in

the highest respect, but it has no bearing on this case. He said the system was wrong. That system was indeed known to the workman, but not its danger.

But there is another question. I think it clear that there was no evidence of wrong, negligent or wilful, in the defendants. It is called negligence, but there was no negligence; what was done was done wilfully and intentionally. I am surprised it should be said as against the defendants, that there was no explanation or suggestion as to what was the cause of the disaster. There was not. But who was to give it? Not the defendants; the plaintiff was to make out his case. It may be that it is in the power of an employer conducting operations such as these to prevent such injuries as this. But who is to prove it? I say, then, there was no evidence of wrong, negligence, or wilfulness in the defendants. It is said that this is not open to them; that the objection was not taken at the trial. I think it clearly was. The defendants applied for a non-suit at the end of the plaintiff's case. Why? Because there was no evidence for the jury. When it was said the thing was intrinsically dangerous, the defendants used the maxim, "Volenti non fit injuria." If this question was not open to the defendants, why was not that objection taken in the Queen's Bench Division and Court of Appeal? A new trial might have been granted. The case is wholly different from *Clarkson* v. *Musgrave* (1), where the objection in the Appeal Court was of a wholly different character from that in the county court, and does not, as it were, arise out of it as here. Here the defendants say, "There is no evidence of wrong in us." Answer: "Your very work is dangerous." Reply: "But you knew it, and undertook it with full knowledge of the extent of the danger." Whether taken or not it should be open to the defendants. Error is caput lupinum. Up to the last moment, if there is irremediable error, it may be objected to. That was here. On this ground also the defendants should succeed. Something ought to be done, a new trial granted, if necessary, to prevent the defendants being made liable to pay damages which, in the opinion of many judges, there was no ground for claiming against them, and which never would have

(1) 9 Q. B. D. 386.

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been claimed but in the hope of an unjust verdict from a jury.

Fortified by the opinion of those judges, I should think this a plain case for the defendants, but that I know your Lordships think otherwise. I am of opinion that the judgment should be affirmed.

LORD WATSON :—

My Lords, this action was brought in the county court of Yorkshire by the appellant, for recovery of damages from the respondent firm, who are railway contractors, in respect of personal injuries sustained by him in their service. The jury, under direction of the judge, returned six specific findings. Three affirmed facts implying fault on the part of the respondents, one negatived contributory negligence, and another assumption of risk by the appellant, whilst the sixth assessed damages at £100. Judgment was delayed in order to give either party an opportunity of moving to have it entered in their favour. At the hearing the respondents confined their challenge of the verdict to the finding relating to risk. They moved for a non-suit, "on the ground that the case ought not to have been allowed to go to the jury, the plaintiff having admitted that he knew of the risk and voluntarily incurred it."

The county court judge refused the motion, and entered judgment for the plaintiff for £100. The defendants appealed to a Divisional Court, consisting of Huddleston B. and Wills J.; who, in consequence of doubts as to the effect of certain recent cases, without expressing any final opinion, took the course of dismissing the appeal, with leave to the defendants to carry the case to the Court of Appeal, in order to obtain an authoritative exposition of the law involved in the maxim, "Volenti non fit injuria."

The case then came before an Appeal Court, composed of Lord Coleridge C.J. with Lindley and Lopes L.JJ., who recalled the decree obtained by the plaintiff in the county court, and directed judgment to be entered for the defendants. In delivering judgment Lord Coleridge dealt with the point which had been raised in the county court, and expressed his opinion

that the judge erred in refusing to hold that the plaintiff undertook to perform a dangerous operation, and took upon himself the risk attending that operation. His Lordship then proceeded to consider the findings with respect to fault, and came to the conclusion that there was no evidence of negligence to go to the jury. Lindley L.J. rested his decision upon the second of these grounds, being of opinion that, according to the evidence, the plaintiff's injuries were the result of "pure accident without any element of negligence in it." In expressing the same view, Lopes L.J. remarked that the "vexed question with regard to the application of the principle of 'Volenti non fit injuria,' which arose in *Thomas* v. *Quartermaine* (1) and *Yarmouth* v. *France* (2), happily does not arise in this case."

The provisions of sect. 120, and following clauses of the County Courts Act 1888 (51 & 52 Vict. c. 43) do not appear to have been brought under the notice of the learned judges of the Appeal Court. These enactments appear to me to exclude all right of appeal upon questions of law which were not raised and submitted at the trial to the county court judge. The reasoning of Lord Field and Cave J., in *Clarkson* v. *Musgrave* (3), although the decision turned upon the terms of the County Courts Act 1875, is in pari materia, and is, in my opinion, equally applicable to the statute of 1888.

In this case, the contention that there was no evidence of negligence to go to the jury was never mooted in the Court of first instance. It was not raised in the notice of appeal to the Divisional Court, and it was neither included in the leave given by that Court, nor referred to in the notice of motion before the Appeal Court. I am, in these circumstances, of opinion that the findings of the jury bearing upon the question of the defendants' fault must be taken as conclusive. The Legislature has purposely taken away from them the right to raise, and from your Lordships the right to entertain, any question of law or fact affecting the validity of these findings. The only finding with which, in my opinion, this House has jurisdiction to deal, is embodied in the question put by the presiding judge: "Did

(1) 18 Q. B. D. 685. (2) 19 Q. B. D. 647.
(3) 9 Q. B. D. 386.

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the plaintiff voluntarily undertake a risky employment with a knowledge of its risks?" and the answer of the jury, which was, "No."

Whilst I am of opinion that it is not within the jurisdiction of any Court of review to set aside jury findings which were not impeached in the county court, it does appear to me to be legitimate and necessary in the present case to examine the findings which relate to negligence, in the light of the facts disclosed in evidence, not with the view of disturbing them, but for the purpose of appreciating their effect and ascertaining the character of the risk which the plaintiff is alleged to have voluntarily undertaken. The facts in evidence do not raise any question of credibility. The real controversy, both in the county court and at your Lordships' Bar, has been directed to the inferences which ought to be derived from them.

The plaintiff was employed by the defendants from December 1887 until the 13th of April 1888 in a rock cutting upon the Halifax High Level Railway. A line of rails upon which there was a travelling steam crane and tackle ran along the edge of the cutting; and the quarried stone was lifted and deposited in trucks by means of the crane. The larger stones were secured by winding the chain round them and hitching the end hook into one of its links; the smaller ones were packed in skips or crates. The plaintiff was engaged in loading the crane until the beginning of February, and after that date in assisting to drill holes for blasting. On the 13th of April he was turning a drill-rod, which two of his fellow-workmen struck alternately with their hammers, when a large stone, which was in course of being raised by the crane, fell upon him, and inflicted the injuries complained of. His fellow-workmen saw the falling stone just in time to get out of its way; but the plaintiff, who was stooping at his work, had not time to make his escape.

No evidence was led on either side as to the character of the stone which fell, to the condition of the chain, or to the actual mode in which the stone was secured. It appears to have been the practice during the whole period of the plaintiff's employment to permit the crane load, whenever it was found convenient, to be swung directly above the workmen engaged in drilling.

At its first start the load swung clear of them, but after it had attained some elevation, the arm of the crane was "jibbed," or deflected to one side or the other, as suited the convenience of those who were loading the trucks. Until the crane was jibbed, the plaintiff, and others employed in drilling, had no means of knowing whether its load would or would not pass over their heads.

Neither of the parties disputed at the trial that the practice in question involved some degree of peril to the workmen employed in drilling. The plaintiff in his evidence stated that he had been long enough at that kind of work to know that the practice was dangerous. He also said, "I had been at the same class of work in the same cutting. They were jibbing over our heads every day." "Sometimes we could see the stones being craned up, and when we saw them we got out of the way." Hanson, a witness for the defendants, who was their foreman in charge at the time of the accident, said that "the men ought to have stopped work while the stone was being jibbed round. *That would be the safe way.*" He admitted that no notice was given them; and he also said, "If the men left their work every time the crane jibbed, it would take two and a half hours to do one hour's work." There is evidence to the effect that one at least of his fellow-workmen had previously complained to the foreman of the danger of slinging stones over their heads. There is no evidence to shew that the practice was necessary to the conduct of the defendants' operations, and could not have been discontinued without interruption of their work.

The questions touching negligence which were left to the jury, and the answers returned by them, were: "(1.) Was the machinery for lifting the stone from the cutting, taken as a whole, reasonably fit for the purpose for which it was applied? (Answer) No. (2.) Was the omission to supply special means of warning when the stones were being jibbed a defect in the ways, works, machinery, and plant? (Answer) Yes. (3.) If so, were the employers (or some person engaged by them to look after the condition of the works, &c.) guilty of negligence in not remedying that defect? (Answer) Yes."

The frame of these questions may be open to criticism; but

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on a fair construction of them, together with the answers given, what the jury meant to affirm seems to me to be tolerably plain. They were not, in my opinion, meant to represent three different phases of negligence, but to affirm three different propositions constituting one form of negligence, namely, the neglect of the defendants to take proper precautions for protecting their employés from the possible consequences of a faulty system of working the crane. It is plain that the *first* question had no reference to any specific flaw in the crane or its tackle, because it expressly relates to the machinery "taken as a whole"—words which, as I understand them, were intended to cover the arrangement and use of the crane and its tackle considered in their relation to other departments of work carried on in the cutting. Accordingly, the first answer of the jury appears to me to affirm that the system of using the crane was not reasonably fit for its purpose, inasmuch as it exposed workmen in another department to unnecessary danger. The *second* affirms that the use of the crane, without warning to the workmen over whose heads its load was jibbed, constituted a defect in the works; and the *third*, that the defendants, or their foremen, were negligent in respect of their failure to remedy that defect. I so construe the findings of the jury, because I feel bound, in the absence of any exception to the charge of the presiding judge, to assume that these questions, as explained by him to the jury, did not embrace any cause of action not arising on the pleadings, and that they did fairly raise the issues disclosed in the plaintiff's pleadings and evidence.

It must be kept in view that, owing to the shape in which the case was submitted to them, the jury were invited to consider these three questions apart from the question of risk, or, in other words, upon the footing that the risk of a stone falling from the crane had not been undertaken by the plaintiff. The incidence of the risk was the subject-matter of a separate question. In that aspect of the findings with regard to negligence, I am not prepared to concur in the observations made upon them by the Court of Appeal. If the plaintiff did voluntarily undertake the risk from which he suffered, there could, as a matter of course, be no negligence imputable to the

defendants. If, on the contrary, the principle of "Volenti non fit injuria" were eliminated from the case, there would, in my opinion, be reasonable and sufficient warrant in the evidence for the verdict returned by the jury.

It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House by Lord Cranworth, and other noble and learned Lords, that it is needless to quote authorities in support of it. But, as I understand the law, it was also held by this House, long before the passing of the Employers' Liability Act (43 & 44 Vict. c. 42) that a master is no less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself. In *Sword* v. *Cameron* (1) the First Division of the Court of Session found a master liable in damages to a quarryman in his employment who was injured by the firing of a blast before he had time to reach a place of shelter, although it was proved that the shot was fired in accordance with the usual and inveterate practice of the quarry. That case was cited in *Bartonshill Coal Company* v. *Reid* (2) in support of the proposition that the doctrine of collaborateur was unknown to the law of Scotland; but Lord Cranworth pointed out (3) that the decision did not turn upon the negligence of the fellow-workman who fired the shot, and expressly stated that it was justifiable, on the ground that "the injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions." The Lord Chancellor (Chelmsford) expressed the same view in *Bartonshill Coal Company* v. *McGuire* (4). The judgment of Lord Wensleydale in *Weems* v. *Mathieson* (5) clearly shews that the noble and learned Lord was also of opinion that a master is responsible in point of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.

(1) 1 Sc. Sess. Cas. 2nd Series, 493.
(2) 3 Macq. 266, 273.
(3) 3 Macq. 289–90.
(4) Ibid. 310.
(5) 4 Macq. 226.

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The main, although not the sole, object of the Act of 1880, was to place masters who do not upon the same footing of responsibility with those who do personally superintend their works and workmen, by making them answerable for the negligence of those persons to whom they intrust the duty of superintendence, as if it were their own. In effecting that object, the Legislature has found it expedient, in many instances, to enact what were acknowledged principles of the common law. Sect. 1 sub-s. 1 provides that the employer shall be liable in cases where a workman is injured by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer. I see no reason to doubt that an arrangement of machinery and tackle, which, although reasonably safe for those engaged in working it, is nevertheless dangerous to workmen employed in another department of the business, constitutes a defect in the condition of the works within the meaning of the sub-section. Sometimes (as in the present case) when the danger is not constantly present, but recurs at intervals, the defect may be cured by giving the workmen timely warning of its approach. The employer may in such cases protect himself, either by removing the source of danger, or by making provision for due notice being given. Should he adopt the latter course, he will still be exposed to liability if injury results from failure to give warning through the negligence of himself or of his superintendent.

The only question which we are called upon to decide, and I am inclined to think the only substantial question in the case, is this, whether, upon the evidence, the jury were warranted in finding as they did, that the plaintiff did not "voluntarily undertake a risky employment with a knowledge of its risks." Whether the plaintiff appreciated the full extent of the peril to which he was exposed or not, it is certain that he was aware of its existence, and apprehensive of its consequences to himself; so that the point to be determined practically resolves itself into the question whether he voluntarily undertook the risk. If, upon that point, there are considerations pro and contra, requiring to be weighed and balanced, the verdict of the jury cannot be lightly set aside. The defendants' case is that the

evidence is all one way; that the plaintiff's continuing in their employment, after he had become aware and had complained of the danger, of itself affords proof absolute and conclusive of his having accepted the risk of a stone falling in the course of its transit from the quarry to the loading bank.

The maxim, "Volenti non fit injuria," originally borrowed from the civil law, has lost much of its literal significance. A free citizen of Rome who, in concert with another, permitted himself to be sold as a slave, in order that he might share in the price, suffered a serious injury; but he was in the strictest sense of the term volens. The same can hardly be said of a slater who is injured by a fall from the roof of a house; although he too may be volens in the sense of English law. In its application to questions between the employer and the employed, the maxim as now used generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his masters. When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence, and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case.

It is material to notice that the Employers' Liability Act, under which the present action was brought, by sect. 2, subsect. 3, provides that a workman shall have no right to compensation for injuries caused by reason of any defect or

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negligence which is specified in sect. 1, in any case where "he knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence." I think the object and effect of the enactment is to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect, and so far the provision operates in favour of the employer; but, as was forcibly pointed out by Lord Esher M.R. in *Thomas* v. *Quartermaine* (1) in cases where the employer and his deputies were personally ignorant of the defect, it is made a condition precedent of the workman's right to recover that he shall have given them information of it before he was injured. That does not lead me to the conclusion that the provisions of the Employers' Liability Act wholly exclude the application of the doctrine "Volenti non fit injuria" to claims falling within the scope of the Act; but it does, in my opinion, shew that the Legislature did not intend that the statutory remedy given to the workman should be taken away simply by reason of his continuing in the same employment after he became aware of the defect from which he ultimately suffered.

There are many kinds of work in which danger is necessarily inherent, where precautions such as would ensure safety to the workman are either impossible, or would only be attainable at an expense altogether incommensurate with the end to be accomplished. In all such cases the workman must rely upon his own nerve and skill; and, in the absence of express stipulation to the contrary, the risk is held to be with him and not with the employer.

On the other hand, there are cases in which the work is not intrinsically dangerous, but is rendered dangerous by some defect which it was the duty of the master to remedy. In cases of that

(1) 18 Q. B. D. 689, 690.

description the relations of the workman to the peril are so various that it is impossible to lay down any rule regarding the operation of the maxim which will apply to them all alike, and I shall refer to two instances only by way of illustration. The risk may arise from a defect in a machine which the servant has engaged to work of such a nature that his personal danger and consequent injury must be produced by his own act. If he clearly foresaw the likelihood of such a result and, notwithstanding, continued to work, I think that, according to the authorities, he ought to be regarded as volens. The case may be very different when there is no inherent peril in the work performed by the servant, and the risk to which he is exposed arises from a defect in the machinery used in another department over which he has no control. The present case belongs to that category. There was no intrinsic danger in the operation of drilling in which the plaintiff was engaged; the peril from which he suffered was not evoked by his act, but was brought into contact with him by workmen employed in a different operation.

I should be prepared to hold that, apart from the Act of 1880, the plaintiff's remedy was not necessarily taken away by the mere fact that, in the knowledge of the risk and after remonstrance, he continued to work. In the circumstances of this case the question whether he had accepted the risk is one of fact; there is no arbitrary rule of law which decides it. The complaints made to the foreman by his fellow-workman, coupled with the fact of their continuing to work, might be fairly construed as an intimation to the defendants that they must either discontinue the vicious practice of slinging stones over the heads of their workmen or take the consequences. It was a protest against the practice, which does not naturally or necessarily imply that they were willing to submit to it or to accept the risk of it. I am confirmed in that view by the decision in *Sword* v. *Cameron* (1), which came very near in its circumstances to the present case. There the dangerous practice consisted in firing a shot at so short an interval after notice to the workmen that they had not time to reach a place of safety, and the pursuer had continued to work until he was injured, in

(1) 1 Sc. Sess. Cas. 2nd Series, 493.

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full knowledge of the practice and its attendant risks. The Court of Session held that the maxim, "Volenti non fit injuria," did not apply; and it appears to me that, in *Bartonshill Coal Company* v. *Reid* (1), Lord Cranworth approved of the judgment. It is true that in the Bartonshill cases there was no question directly raised in regard to the maxim; but the noble and learned Lord examined the facts of *Sword* v. *Cameron* (2) in detail, and expressed the opinion, not that the decision might be explained, but that it was justifiable in the circumstances of the case.

This case, however, is under the statute of 1880, and, as already indicated, I am of opinion that the mere fact of the plaintiff having continued in the employment of the defendants cannot defeat his statutory claim. I therefore concur with the majority of your Lordships in thinking that the order of the Court of Appeal must be reversed, and the judgment of the county court judge restored.

LORD HERSCHELL (after stating the facts and the course of the proceedings set forth above, continued as follows):—

My Lords, the first argument addressed to your Lordships by the learned counsel for the appellant was that it was not competent for the respondents to raise the objection that there was no evidence of negligence, no such point having been made in the County Court. In support of this proposition he cited the case of *Clarkson* v. *Musgrave* (3), which is a distinct authority to that effect. The learned counsel for the respondents did not impeach the authority of that decision, or invite your Lordships to overrule it. I see no reason to think the decision was erroneous. It would, in my opinion, be very mischievous if an appeal from a decision of a county court could be sustained on the ground that there was no evidence to go to the jury when that point had not been raised before the county court judge. In the present case it is perfectly clear that no such objection was ever taken. At the close of the evidence for the plaintiff

(1) 3 Macq. 290. (2) 1 Sc. Sess. Cas. 2nd Series, 493.
(3) 9 Q. B. D. 386.

the only ground submitted for a non-suit was that the plaintiff had himself admitted that he knew of the risk, and voluntarily incurred it, and it was on this ground that the defendants applied to have judgment entered for them, notwithstanding the finding of the jury. Indeed, in the notice of motion in the Queen's Bench Division on appeal from the county court, the ground that there was no evidence of negligence is nowhere taken. I think, then, it was not competent for the Court of Appeal to inquire whether there was any evidence of negligence. For the reasons I have given, I do not think it is necessary to determine whether there was such evidence in the present case, but I am far from being satisfied that there was not. No satisfactory explanation was given of the cause which led to the fall of the stone and the consequent injury to the plaintiff. It is said that whilst in some cases the fall of a substance, such as a bale of cotton, which is being raised by a crane would, if unexplained, be evidence of negligence, the fall of a stone from a crane, as in the present instance, is not so, because stone is apt to disintegrate and thus to fall; but I am not prepared to admit that it is beyond the reasonable power of an employer conducting operations such as those in question to prevent the risk of injury to life or limb of those who are working at the locality over which the stones are being lifted. I should have thought it would have been possible to use such appliances as under ordinary circumstances to prevent the risk of the stones falling; but if it be not possible to do so, and the stones cannot pass over those engaged in other operations below without serious danger to them, it would certainly be within the employer's power to warn them when it is necessary to desist from work and get out of the way of the impending risk. It seems to me, then, that the employer in such a case is in this dilemma: either it was reasonably practicable for him to use appliances by which the accident would have been avoided, in which case he should have done so, or, if it was not, sufficient warning should have been given to those endangered to enable them to escape the danger. It is of course possible that the employer might have shewn that neither of these courses was reasonably practicable. But that is immaterial. All that I am concerned with at the present moment

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is whether the accident which happened afforded evidence of negligence.

It was of course open to the respondents to contend that, after the admission of the plaintiff as to his knowledge of the dangerous character of the work, the case ought to have been withdrawn from the jury, and judgment entered for them, and this was the point strenuously argued at your Lordships' Bar on their behalf. It was said that the maxim, "Volenti non fit injuria," applied, and effectually precluded the plaintiff from recovering. The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong. The maxim has no special application to the case of employer and employed, though its application may well be invoked in such a case. The principle embodied in the maxim has sometimes, in relation to cases of employer and employed, been stated thus:—A person who is engaged to perform a dangerous operation takes upon himself the risks incident thereto. To the proposition thus stated there is no difficulty in giving an assent, provided that what is meant by engaging to perform a dangerous operation, and by the risks incident thereto, be properly defined. The neglect of such definition may lead to error. Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done him, even though the cause from which he suffers might give to others a right of action. For example, one who has agreed to take part in an operation necessitating the production of fumes injurious to health, would have no cause of action in respect of bodily suffering or inconvenience resulting therefrom, though another person residing near to the seat of these operations might well maintain an action if he sustained such injuries from the same cause.

But the argument for the respondents went far beyond this. The learned counsel contended that, even though there had been negligence on the part of the defendants, yet the risk created by it was known to the plaintiff; and inasmuch as he continued in

the defendants' employment, doing their work under conditions, the risk of which he appreciated, the maxim, "Volenti non fit injuria," applied, and he could not recover; that his proper course, if he wished to avoid the risk of his employers' negligence, was to refuse to perform the work under such conditions. Their argument necessarily went this length, for the facts on which it was grounded were simply these: that the plaintiff had admitted that he knew the work was dangerous. I am not quite sure that he was not referring in his answer to the character of the work generally, rather than to the special danger arising from jibbing the stones overhead; but in a subsequent answer he stated that he had heard a fellow-workman say to the ganger that it was dangerous to jib stones and skips over their heads, and that he thought so too.

It is obvious that the degree in which the work was dangerous depended entirely on the conditions under which it was carried on and the amount of care exercised. It would be practically unimportant or very great according to the character of the appliances used, the mode in which the stone was slung, and the presence or absence of warning at the critical time. In the present case it must be taken on the finding of the jury that the danger was at least enhanced and the catastrophe caused by the negligence of the defendants; and the question for your Lordships' consideration is whether, under such circumstances, the fact of the plaintiff having continued to perform the duties of his service precludes his recovery in respect of this breach of duty because the acts or defaults which constituted it were done "volenti."

There may be cases in which a workman would be precluded from recovering even though the risk which led to the disaster resulted from the employer's negligence. If, for example, the inevitable consequence of the employed discharging his duty would obviously be to occasion him personal injury, it may be that, if with this knowledge he continued to perform his work and thus sustained the foreseen injury, he could not maintain an action to recover damages in respect of it. Suppose, to take an illustration, that owing to a defect in the machinery at which he was employed the workman could not perform the required

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operation without the certain loss of a limb. It may be that if he, notwithstanding this, performed the operation, he could not recover damages in respect of such a loss; but that is not the sort of case with which we have to deal here. It was a mere question of risk which might never eventuate in disaster. The plaintiff evidently did not contemplate injury as inevitable, not even, I should judge, as probable. Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffer from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim, "Volenti non fit injuria," applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong.

It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered. If, then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightway refuse to continue his service, it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invited or assented to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim, "Volenti non fit injuria," becomes applicable.

It was suggested in the course of the argument that the employed might, on account of special risk in his employment, receive higher wages, and that it would be unjust that in such a case he should seek to make the employer liable for the result of the accident. I think that this might be so. If the employed agreed, in consideration of special remuneration, or otherwise, to

work under conditions in which the care which the employer ought to bestow, by providing proper machinery or otherwise, to secure the safety of the employed, was wanting, and to take the risk of their absence, he would no doubt be held to his contract, and this whether such contract were made at the inception of the service or during its continuance. But no such case is in question here. There is no evidence that any such contract was entered into at the time when the plaintiff was first engaged, and the fact that he continued work notwithstanding the employer's breach of duty affords no evidence of such special contract as that suggested.

It is to be observed that the jury found that the plaintiff did not voluntarily undertake a risky employment with knowledge of its risks, and the judgment of the county court, founded on the verdict of the jury, could only be disturbed if it were conclusively established upon the undisputed facts that the plaintiff did agree to undertake the risks arising from the alleged breach of duty. I must say, for my part, that in any case in which it was alleged that such a special contract as that suggested had been entered into I should require to have it clearly shewn that the employed had brought home to his mind the nature of the risk he was undertaking and that the accident to him arose from a danger both foreseen and appreciated.

I have so far dealt with the subject under consideration as matter of principle apart from authority; but it appears to me that the view which I have taken receives strong support from the approval with which Lord Cranworth refers to the case of *Sword* v. *Cameron* (1) in his judgment in the case of the *Bartonshill Coal Company* v. *Reid* (2).

In *Sword* v. *Cameron* (1) it was the pursuer's duty to work near a crane, and other servants were employed to blast the rock. The practice was to give a signal to the men by the word "fire." It was then the duty of the men employed at the crane to hasten away. The interval allowed before firing varied from one minute to two. The pursuer was struck when he had got fifty or sixty yards off. An interval of about two minutes elapsed between the order to fire and the explosion, and it was stated to have frequently

(1) 1 Sc. Sess. Cas. 2nd Series, 493.

(2) 3 Macq. 290.

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occurred that by the effects of the explosion stones flew over the heads of the retreating workmen. Lord Cranworth said: "This case may be justified without resorting to any such doctrine as that a master is responsible for injuries to a workman in his employ occasioned by the negligence of a fellow-workman engaged in a common work. The injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions. It is to be inferred from the facts stated, that the notices and signals given were those which had been sanctioned by the employer, and that the workmen had been directed to remain at their work near the crane till the order to fire had been given, and then that after the interval of a minute or two the explosion should take place. The accident occurred not from any neglect of the man who fired the shot, but because the system was one which did not enable the workmen at the crane to protect themselves by getting into a place of security."

This case appears to me to be analogous to the present, and the ground upon which Lord Cranworth bases the liability of the employer to be applicable to it. It will be noticed that in that case the defective system which created the risk, and from which the pursuer suffered, was known to him, and that he continued his work notwithstanding this knowledge; yet it never appears to have occurred, either to the Scotch Court or to Lord Cranworth, that this absolved the employer from liability.

In *Yarmouth* v. *France* (1), the plaintiff was subjected to a risk owing to a defect in the condition of what was held to be plant within the meaning of sect. 1 of the Employers' Liability Act. He complained of this to the person who had the general management of the defendant's business, but was told nevertheless to go on with his work. He did so, and sustained the injury for which he brought his action. The county court judge gave judgment for the defendant on the ground that the plaintiff must be assumed to have assented to take upon himself the risk, on the authority of *Thomas* v. *Quartermaine* (2), to which case I will refer immediately. The Court of Appeal ordered a new trial. Lindley L.J. said: "The Act cannot, I think, be properly construed in such a way as to protect a master who know-

(1) 19 Q. B. D. 647. (2) 18 Q. B. D. 685.

ingly provides defective plant for his workmen, and who seeks to throw the risk of using it on them by putting them in the unpleasant position of having to leave their situations or submit to use what is known to be unfit for use." And further on he observes: "If nothing more is proved than that the workman saw danger, reported it, but on being told to go on went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of taking the risk upon himself."

I think that the judgment in *Yarmouth* v. *France* (1) was perfectly right; but I should not lay the same stress as Lindley L.J. did upon the fact that the workman had remonstrated against the risk to which he was exposed, and on being told to continue his work did so to avoid dismissal. For the reasons which I have given, I think that where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk and does not remonstrate, does not preclude his recovering in respect of the breach of duty, by reason of the doctrine, 'Volenti non fit injuria," which in my opinion has no application to such a case. It appears to me that sect. 2, sub-sect. 3, of the Employers' Liability Act, indicates that the Legislature regarded this as the law.

The defendants' counsel naturally placed his main reliance upon the case of *Thomas* v. *Quartermaine* (2). The plaintiff there was employed in a room in the defendants' brewery, where a boiling and a cooling vat were placed. A passage which was in parts only three feet wide ran between these two vats, the rim of the cooling vat rising sixteen inches above the passage. The plaintiff went along this passage in order to get from under the boiling vat a board which was used as a lid, and as this lid stuck, the plaintiff gave it an extra pull, when it came away suddenly, and the plaintiff, falling back into the cooling vat, was scalded. The county court judge held that there was evidence of defect in the condition of the works in there being no sufficient fence to the cooling vat. He found that the condition of the vat was known to both the plaintiff and the defendant, and that the plaintiff

(1) 19 Q. B. D. 647. (2) 18 Q. B. D. 685.

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had not been guilty of contributory negligence, and he gave judgment for him. The case was carried to the Court of Appeal where the learned judges, Bowen and Fry L.JJ. (the Master of the Rolls dissenting), affirmed a decision of the Divisional Court directing judgment to be entered for the defendant.

The judgments of the learned judges forming the majority in that case were chiefly occupied by a consideration of the provisions of the Employers' Liability Act. It appears to have been contended in that case that the effect of the statute was to preclude the employer from relying on the maxim, "Volenti non fit injuria," in cases where, but for the statute, such a defence would have been open to him. But it is to be observed that in the case there under consideration, the county court judge had found that the defendant was himself aware of the defective condition of his works, and if he had not taken reasonable care so to carry on his business as not to subject those employed by him to undue risk, he would, according to the law laid down by this House in *Bartonshill Coal Company* v. *Reid* (1), be primâ facie liable to an action. The learned judges, however, came to the conclusion that the defendant was entitled to judgment, because the maxim, "Volenti non fit injuria," applied, the county court judge having found that the condition of the vat was known to the plaintiff as well as to the defendant. I find myself unable to concur in the view that this could properly be held under the circumstances as matter of law. The fact seems to have been lost sight of that the danger to the plaintiff did not arise from the circumstance that he had to pass from one part of the premises to the other, in proximity to the vats, even if this would have justified the conclusion arrived at. The accident arose from an operation being performed by him in the neighbourhood of the vats, namely, getting a board which served as a lid from under one of them. As far as appears, this was amongst the ordinary duties of his employment, and if it was assumed that there was a breach of duty on the part of the employer in not having the vats fenced, as it obviously was, since if there had been no breach of duty it would not have been necessary to inquire whether the maxim, "Volenti non fit injuria," afforded a defence, it seems to

(1) 3 Macq. 266.

me that it must have been a question of fact, and not of law, whether the plaintiff undertook the employment with an appreciation of the risk which arose on the occasion in question from the particular nature of the work which he had to perform. If the effect of the judgment be that the mere fact that the plaintiff after he knew the condition of the premises continued to work and did not quit his employment, afforded his employer an answer to the action even though a breach of duty on his part was made out, I am unable, for the reasons I have given, to concur in the decision.

I think that the judgment of the Court below in the case now before your Lordships ought to be reversed, and judgment for the plaintiff restored.

LORD MORRIS :—

My Lords, the circumstances of this case have been so fully stated by your Lordships, who have already spoken, that it is unnecessary for me to repeat them. I concur in the conclusion arrived at by the Court of Appeal, that the findings of the jury as to negligence were not warranted by the evidence, and that there was no evidence of negligence conducing to the plaintiff's injury; but I do not consider that it therefore follows that judgment should be entered for the respondents.

The action was not one in the superior Courts, and it must be governed by the statutes regulating appeals from the county courts. Now, in the present case no objection was made at the trial on the part of the respondents that there was no evidence upon which the jury could find there was negligence on their part; nay, more, in the notice of motion, by way of appeal, in the Queen's Bench Division, no objection was taken that there was no evidence of negligence. The question of law raised at the trial, both at the close of the plaintiff's case in asking for a non-suit, and at the close of the entire case in asking for judgment, was, that the plaintiff having admitted that he knew the risk and voluntarily incurred it, the defendants were entitled to succeed. No question of law was raised as to there being no evidence to go to the jury to establish the defendants' negligence.

The Court of Appeal decided the case upon a question of law not taken at the trial. I can find no reference in any of the

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judgments in the Court of Appeal as to their competency to entertain and decide upon a point not made at the trial, nor does the case of *Clarkson* v. *Musgrave* (1) appear to have been cited. It is an express decision, and one in which I entirely concur, that it is a condition precedent to the right of appeal that the question of law upon which it is desired to appeal should have been raised before the county court judge at the trial. If the point, that there was no evidence of negligence, had been made by the defendants at the trial, I am of opinion they would be now entitled to judgment; but, in my opinion, that point is not now open, and the case must be dealt with, assuming the findings of the jury as to the negligence of the defendants. The findings were: "1st. Was the machinery for lifting the stone from the cutting, taken as a whole, reasonably fit for the purpose for which it was applied?" The jury found, "No." "2nd. Was the omission to supply special means of warning, when the stones were being jibbed, a defect in the ways, works, machinery, and plant?" The finding was, "Yes." "3rd. If so, were the employers, or some person engaged by them to look after the condition of the works, guilty of negligence in not remedying that defect?" (Answer) "Yes."

Notwithstanding these findings, the respondents have argued that they are entitled to judgment, inasmuch as the appellant admitted he knew of the risk, and voluntarily incurred it. His evidence on that point was: "I am a navvy, and am accustomed to this particular work. I have been at it long enough to know it is dangerous." And again: "I told the crane-driver that it was not safe to jib stones over our heads."

On the hypothesis that the respondents were guilty of negligence conducing to the accident, which is the result of the findings of the jury unchallenged at the trial, the respondents still rely on the application of the maxim, "Volenti non fit injuria," and the decision in the case of *Thomas* v. *Quartermaine* (2), as precluding the plaintiff from recovering. The facts of that case are few and simple. A passage ran between a cooling and a boiling vat in the defendant's brewery. The plaintiff went along the passage to pull a board from under the boiliug vat, and in so doing he pulled too strongly, and the board coming

(1) 9 Q. B. D. 386. (2) 18 Q. B. D. 685.

out suddenly he fell back into the cooling vat and was injured. The county court judge held that there was no sufficient fence to the cooling vat, and that the condition of the cooling vat was known to both plaintiff and defendant. This latter finding was a mere truism, for both plaintiff and defendant must have seen and known that the cooling vat was not fenced. I concur in the decision of the Court of Appeal, and in the judgments of Bowen and Fry L.JJ. in that case. In the first place, the danger from the narrowness of the passage and the unfenced state of the cooling vat, if it was a danger, was patent to the plaintiff, a workman employed there. Neither he nor any one else complained of danger. There was no evidence that the passage was dangerous in the ordinary use of it. The accident happened in an extraordinary use of the passage—viz., the fall of the plaintiff while pulling with undue force the board. He was not directed to get the board; he did it of himself. There was no evidence, in my opinion, of any negligence of the defendant; and, even if there was, it was patent and well known to the plaintiff, who voluntarily, and with the fullest knowledge of the full extent of the danger, incurred it. The principle as laid down by Bowen L.J. is clear and conclusive, viz.: "Where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence." Apply that principle to the facts of this case as found by the jury. The appellant did not know that the machinery was not reasonably fit for the purpose; a fellow-workman in his presence had complained of the danger of jibbing stones to Rings, who had acted as ganger, and the appellant had complained to the crane-driver, who laughed at him.

My Lords, I have already said that I see no evidence to support the finding that the machinery was not reasonably fit for the purpose, nor of any negligence in its use; but the finding so stands. The appellant may have voluntarily entered on a risky business; but he did not voluntarily undertake it plus the risk from defective machinery. There must be an assent to undertake the risk with the full appreciation of its extent. In my opinion, the findings of the jury, in answer to questions 2 and 3,

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of negligence by the respondents in not supplying means of warning when the stones were being jibbed, do not avail the plaintiff. He undertook a dangerous work of drilling holes, while over his head (unless he moved away) stones were being hauled by a crane. That work he entered upon knowing it was dangerous to that extent. He worked for months, knowing there was no special warner to caution him, but running his chance of getting out of the way, when the crane would otherwise pass over his head. He was, in my opinion, both sciens and volens as to all the danger except that arising from unfit machinery. Of that danger he was not aware. I more than doubt it existed at all; but the right of appeal is a statutable one: the respondents have not brought themselves within the statute, in not objecting at the trial to the want of any evidence to support the first finding; while it stands, the maxim, "Volenti non fit injuria," appears inapplicable. How can the plaintiff be held to voluntarily incur a danger from unfit machinery, the unfitness of which he was admittedly not aware of? The case of *Thomas* v. *Quartermaine* (1) for the same reason is no authority for the respondents' contention.

In result, I am of opinion that the appellant is entitled to succeed on the course the case has taken, and with the limited right of review accorded to the Divisional Court, to the Court of Appeal, or to your Lordships' House.

Order of the Court of Appeal reversed and order of the Queen's Bench Division restored: the respondents to pay to the appellant the costs in the Court of Appeal and the costs incurred by him in respect of his appeal to this House, the costs in this House to be taxed in the manner usual when the appellant sues in formâ pauperis: cause remitted to the Queen's Bench Division.

Lords' Journals 21st July 1891.

Solicitors for appellant: *J. H. Bridgford for Longbottom & Sons, Halifax.*

Solicitors for respondents: *Watson, Sons & Room for Neill & Broadbent, Bradford.*

(1) 18 Q. B. D. 685.

[HOUSE OF LORDS.]

GEORGE JOHNSON (PAUPER) . . . . . APPELLANT;

AND

W. H. LINDSAY & CO. . . . . RESPONDENTS.

H. L. (E.)
1891
July 28.

Negligence—Master and Servant—Common Employment—Contractor and Sub-contractor.

In an action to recover damages for injury caused by the negligence of the defendant's servant, the defence of common employment is not applicable unless the injured person and the servant whose negligence caused the injury were not only engaged in a common employment but were in the service of a common master.

Builders contracted to build a block of houses, under a specification prepared by the owners' architect, certain fireproof portions of the houses to be executed by the respondents, who were iron-founders. The respondents contracted with the architect to do their portion of the work, and had no contract with the builders and were not under their direction or control. While the respondents were carrying out their contract workmen employed by them in raising concrete to the upper storey of the building negligently let a bucket fall on the appellant, who was working in the lower storey in the employment of the builders. In respect of the injury thus caused the appellant brought an action against the respondents:—

Held, reversing the decision of the Court of Appeal (23 Q. B. D. 508), that since the relation of master and servant did not exist between the respondents and the appellant the doctrine of collaborateur did not apply and the action was maintainable.

Wiggett v. *Fox* (11 Ex. 832) commented on.

Woodhead v. *Gartness Mineral Company* (4 Sc. Sess. Cas. 4th Series, 469) and *Maguire* v. *Russell* (12 Sc. Sess. Cas. 4th Series, 1071) disapproved.

Lord Cairns' observations in *Wilson* v. *Merry* (Law Rep. 1 H. L., Sc. 331, 332) explained.

APPEAL from an order of the Court of Appeal (1).

The following statement of the facts is taken from the judgments of Lords Watson and Herschell:—

The action was brought by the appellant for damages in respect of personal injury sustained by him through the negligence of workmen in the service of Lindsay & Co., the respondents. At the time of the accident the appellant was a labourer in the

(1) 23 Q. B. D. 508.

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employment of the firm of Higgs & Hill, and the only defence set up by the respondents, now insisted on, was thus stated in their pleadings: "The plaintiff was a workman, and was a fellow-servant of and was engaged in one common service and employment with certain of the defendants' servants, who were also workmen and competent to do their work, and the said injuries, if caused by the negligence of any person or persons for whose negligence the defendants would be answerable (all of which is denied) were caused by the defendants' said servants while they and the plaintiff were such fellow-servants, and engaged in such common service and employment, and in the course thereof, and not otherwise, without any personal negligence or interference on the part of the defendants."

The terms of that plea render it necessary to determine the precise relation subsisting between the appellant and the workmen by whose negligence he was injured. The ascertainment of that relation depends, not upon conflicting testimony, but upon facts which are not controverted, and upon documentary evidence.

Messrs. Higgs & Hill, the appellant's employers, were contractors for building a block of artizans' dwellings, in accordance with plans and specifications prepared by Mr. Burden, the owners' architect. Part of the contemplated work consisted of fire-proof flats and floors of concrete for laundry purposes, to be completed on the "Lindsay" system, so called in consequence of the respondents being specialists in that kind of work. In the specification the details of these fire-proof flats and floors are entered under the heading, "Power for other tradesmen to perform works"; and there is a general provision that "in order to carry out those works specified to be executed by other tradesmen, and for which provisional amounts are included in this estimate, the contractors are to allow free access to the premises and all reasonable facilities to such tradesmen for carrying out the several works reserved for them to perform." The only other obligations which the specification imposes upon the contractors with regard to the fire-proof flats and floors are as follows: "Provide the sum of £215 net to be paid Messrs. Lindsay & Co. of the Paddington Iron Works, No. 14 South Wharf, Paddington,

or any other firm approved by the architect, for fire-proof flats and floors to roofs and laundries, fixed and laid complete. The contractors are to allow Messrs. Lindsay the use of their scaffolding, and to provide them any needful attendance for the carrying out of their work, and are to work with them as may be necessary for the due dispatch of their work. The work in respect of which this provision is included is to be carried out in accordance with a specification and instructions to be furnished by the architect."

Mr. Burden transacted with the respondents directly, and prior to the contract with Higgs & Hill being entered into had received from the respondents an estimate for the fire-proof flats and floors, the amount of the estimate (which was headed "Workmen's Dwellings Association Company, R. H. Burden Esq. Architect") being the sum of £215. Mr. Burden did not, as he explains in his evidence, absolutely bind himself to the respondents, having reserved the right to employ another firm if he chose; but, when the building was ready for their work, he directed them to proceed with it, which they accordingly did. The respondents had no contract with Higgs & Hill; and they came under no obligation either to receive directions from that firm, or in any way to submit to their control. The evidence does not shew or even suggest that, in point of fact, Higgs & Hill ever attempted to interfere with the respondents' work, or to assume control over their servants who were employed in its execution.

It is not disputed that the appellant was engaged and paid by Higgs & Hill, or that the workmen through whose fault he was injured were engaged by, and received their wages from, the respondents. At the time when he was injured, the appellant was clearing away rubbish from the lower storey of the building, in the course of his duty, as the servant of Higgs & Hill, who had undertaken to perform that operation. The respondents' servants were raising buckets of concrete to the topmost storey, for the purposes of their contract with Mr. Burden, by means of a pulley and tackle, supplied by Higgs & Hill, as required by the specification, when, through want of due care on the part of the respondents' servants, a bucket fell upon and injured the appellant.

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At the trial before Grantham J. the jury found a verdict for the plaintiff for £52 10*s.*, and judgment was entered accordingly. The Queen's Bench Division (Pollock B. and Manisty J.) ordered the verdict and judgment to be set aside and judgment to be entered for the defendants on the ground that the plaintiff at the time of the accident was engaged in a common employment with the servant of the defendants whose negligence caused the injury to the plaintiff, and that the defendants therefore could not be held liable. This judgment was affirmed by the Court of Appeal (Cotton and Lopes L.JJ., Fry L.J. dissenting (1)).

June 5. *Guiry* (*W. P. Horton* with him) for the appellant:—

The majority of the Court of Appeal took an erroneous view of the facts as well as of the law. The appellant and the workmen whose negligence caused the injury were not engaged in a common employment under a common master. The appellant was the servant of Higgs & Hill: he was employed and paid by them, and not by the respondents. The workmen whose negligence caused the injury were employed and paid by the respondents. The respondents were not servants of Higgs & Hill nor under their direction or control, but were independent contractors. The freedom of a master from liability in actions like the present rests on the basis that there was not only a common employment but a common master. The doctrine of collaborateur is first recorded in *Priestley* v. *Fowler* (2), where the language of the judgment went much further than the occasion made necessary. The decision of the Court of Appeal in the present case was based on *Wiggett* v. *Fox* (3). The authority of that case has been much questioned—e.g. by Cockburn C.J. in *Rourke* v. *White Moss Colliery Company* (4)—and cannot be supported unless upon the view of the facts explained by Channell B. in *Abraham* v. *Reynolds* (5); viz. that the deceased was paid by the defendants and under their control and subject to be dismissed by them. That there must be a common employment and a common master in order to give the master a good defence in

(1) 23 Q. B. D. 508.
(2) 3 M. & W. 1.
(3) 11 Ex. 832.
(4) 2 C. P. D. 205, 208.
(5) 5 H. & N. 143, 150.

an action was pointed out in *Turner* v. *Great Eastern Railway Company* (1) and in other cases.

Kemp Q.C. and *Poulter*, for the respondents:—

The true view of the relations between the respondents and Higgs & Hill was that taken by the Court of Appeal; viz. that the respondents and their workmen were the servants of Higgs & Hill. Both the respondents and Higgs & Hill were under the control of Burden. The common employment and the common master therefore existed in this case. But the language of the judgment in *Priestley* v. *Fowler* (2) and the decision in *Morgan* v. *Vale of Neath Railway Company* (3) shew that it is not necessary that the two servants should be engaged upon the same work. The risk which the appellant ran was incidental to the service and he must be taken to have agreed to run that risk. That is the test and not whether the two workmen are fellow-servants. In Scotland "the rule of law which imposes upon a master responsibility for injury caused by the fault of his servant, while employed in his service, applies only in cases where the person injured is a stranger, not connected with the work in which the servant is engaged, and in other cases the master is only responsible for personal fault": *Woodhead* v. *Gartness Mineral Company* (4), where the rule is expressly founded on the decisions of the House of Lords in *Bartonshill Coal Company* v. *Reid* (5) and *Wilson* v. *Merry* (6). In the last-named case the observations of Lord Cairns are strongly in the respondents' favour. *Woodhead* v. *Gartness Mineral Company* (4) was followed in *Maguire* v. *Russell* (7).

If the respondents had not exercised due care in the choice of their workmen or had been otherwise personally negligent they would no doubt have been liable; but this was not suggested, and they are therefore free from responsibility, the appellant being (in the words of the Scotch decision) connected with the work. The present case is on all fours with *Wiggett* v. *Fox* (8).

(1) 33 L. T. (N.S.) 431.
(2) 3 M. & W. 1.
(3) Law Rep. 1 Q. B. 149.
(4) 4 Sc. Sess. Cas. 4th Series, 469.
(5) 3 Macq. 266, 295.
(6) Law Rep. 1 H. L., Sc. 326, 331, 332.
(7) 12 Sc. Sess. Cas. 4th Series, 1071.
(8) 11 Ex. 832.

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Guiry, in reply.

The House took time for consideration.

July 26. LORD HERSCHELL (after stating in substance the facts given above, proceeded thus) :—

The only other facts necessary to be stated are that there were, as far as appears, no communications between Higgs & Hill and Lindsay & Co. before the latter commenced their work, and that it was the architect who advised them that the buildings were sufficiently advanced to enable them to commence the work for which they had given him an estimate. It should be added that the payments were made to Lindsay & Co. through Higgs & Hill, and that at the time when the accident happened the appellant was not engaged about the work included in Lindsay & Co.'s contract.

Upon this state of facts it is, I think, clear that the appellant was in no sense the servant of Lindsay & Co. It follows, therefore, that if it is essential to the defence of common employment that the person suing should himself be the servant of the master by whose servant's negligence the injury has been caused, the defence cannot be sustained in the present case. And upon a review of the authorities, I am unable to entertain any doubt that this is essential. Lord Cranworth, in delivering his opinion in this House, in the case of the *Bartonshill Coal Company* v. *Reid* (1), thus states the rule established in this country: "When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks." The law is laid down in substantially the same terms by Lord Blackburn in *Howells* v. *Landore Steel Company* (2) and by Lord Chief Justice Erle in *Hall* v. *Johnson* (3), who, in delivering the judgment of the Exchequer Chamber, said: "The case falls within the principle established, not only in this country, but

(1) 3 Macq. 266, 295. (2) Law Rep. 10 Q. B. 62.
(3) 3 H. & C. at p. 595.

also in Scotland, Ireland, and America, that a servant when he engages to serve a master undertakes as between himself and his master to run all the ordinary risks of the service, including negligence on the part of a fellow-servant, when he is acting in the discharge of his duty as a servant of him who is the common master of both." And in the recent case of *Swainson* v. *North Eastern Railway Company* (1) Lord Bramwell said: "We must consider what obligations a servant takes upon himself; it is sometimes said that he contracts to take upon himself the risks of his service; but the proposition may also be stated as follows, namely, that he has not stipulated for a right of action against his master if he sustains damage from the negligence of a fellow-servant. The two forms of the proposition seem to me substantially the same; in either case it is necessary to prove that a relation has been established between the person who complains and the master of the person who does the injury." The present Master of the Rolls in the same case thus expressed himself: "I think that the authorities bear out the proposition laid down in the Exchequer Division, that in order to give rise to the exemption there must be a common employment and a common master. It is not necessary that there should be a common service for a definite time or at fixed wages, for the exemption exists in the case of volunteers and of other persons, where plainly there has been no contract for payment: a volunteer puts himself under the control of another person, and in respect of that other person he is for the time being in the position of a servant."

These authorities are sufficient to establish the proposition that unless the person sought to be rendered liable for the negligence of his servant can shew that the person so seeking to make him liable was himself in his service, the defence of common employment is not open to him. Such service need not, of course, be permanent or for any defined term. The general servant of A. may for a time or on a particular occasion be the servant of B., and a person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of servant, so as to be

(1) 3 Ex. D. at pp. 348, 349.

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regarded as such. This, as has been pointed out, is the position of a volunteer. But it is obvious that if the exemption results, as it does according to the authorities I have cited, from the injured person having undertaken, as between himself and the person he sues, to bear the risks of his fellow-servant's negligence, it can never be applicable when there is no relation between the parties from which such an undertaking can be implied. There are other considerations which point in the same direction. It must be remembered that whilst a servant contracts with his master to bear the risks of the negligence of his fellow-servants, there is, as has been more than once laid down, a corresponding duty on the part of the employer to take due care to select competent servants. And it would be most unreasonable to hold that he is exempt from liability for his servants' negligence in any case where he is not under this obligation. But I do not see how such an obligation can arise otherwise than from some contractual relation. The obligation and the exemption appear to me to be correlative and to be implied from the relation of master and servant created between the parties.

The language used by Lord Cairns in *Wilson* v. *Merry* (1) was much pressed upon your Lordships. It appears to have been supposed to countenance a wider exemption than is to be deduced from the other authorities to which I have referred. Lord Cairns, in delivering his opinion in this House, said: "I would only add to this statement of the law, that I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense the fellow-workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred the negligence has no doubt been the negligence of a fellow-workman; but the case of the fellow-workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand on higher and broader grounds." But it is clear to my mind that when Lord Cairns used this language he was only intending to repudiate the contention put forward by the appellant in that case, that the rule applied exclusively to workmen of the same grade actually employed in

(1) Law Rep. 1 H. L., Sc. 326, 331, 332.

a common labour, and had no application where the person whose negligence was complained of was in the position of a manager not taking part in manual labour, who was in fact the employer's alter ego. Other passages in the noble and learned Lord's opinion indicate, I think clearly, that he did not intend to state the law differently from Lord Cranworth, whose opinion in the *Bartonshill Coal Company* v. *Reid* (1) he quotes with approval.

It is said however that the case of *Wiggett* v. *Fox* (2) is decisive in favour of the respondents, and this view was adopted in the Courts below. With deference to the learned judges who have entertained this view, I am quite unable to concur in it. If the law there laid down would determine the present case in favour of the respondents, I should feel bound to reject it as inconsistent with all the other English authorities. The plaintiff in *Wiggett* v. *Fox* (2) was the administratrix of a servant of a sub-contractor who had been employed by the defendants to do a part of the work included in their contract. It was held that he was a fellow-servant of the servant of the defendants whose negligence caused him injury; that the sub-contractor and his servants had become the servants of the contractor. The ground of this decision was explained by Baron Channell in *Abraham* v. *Reynolds* (3) to be that it was proved that the deceased was paid by the defendants, and that the defendants had a control over and power to dismiss the deceased, though engaged by the sub-contractor. It is unnecessary to consider whether this view of the facts was correct, though the propriety of the decision has been more than once doubted, and notably by Lord Chief Justice Cockburn in *Rourke* v. *White Moss Colliery Company* (4); for a decision resting on such a view of the facts can, as it seems to me, have no application to the present case. In the first place, I do not think that Lindsay & Co. were sub-contractors under Higgs & Hill; I think they had an independent contract with those who were employing Higgs & Hill. In the second place, even if they are to be regarded as in some sense sub-contractors under Higgs & Hill, I think it

(1) 3 Macq. 266.
(2) 11 Ex. 832.
(3) 5 H. & N. 143, 150.
(4) 2 C. P. D. 205, 208.

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is impossible to say that the servants of Higgs & Hill were the servants of Lindsay & Co., or that they had put themselves under the control of Lindsay & Co. to act as their servants, or were in any way acting as such at the time of the accident.

It only remains for me to notice the recent Scotch decision in the case of *Woodhead* v. *Gartness Mineral Company* (1), which was naturally much relied on by the respondents. Lord Justice Lopes stated in the Court below, I think quite correctly, that this decision carried the principle of common employment much further than was warranted by any of the English authorities. And it appears to me to be a development of the doctrine which is really in antagonism with cases which have been decided in this country. It eliminates altogether the element that the injured man and the man doing the injury must be in the employ of a common master, and treats as unimportant that which I consider to be of the essence of the exemption, that is to say, the mutual undertakings between the employer and employed to be implied from the relationship of master and servant constituted between them.

I think the judgment appealed from ought to be reversed and the judgment entered for the plaintiff restored, and I so move your Lordships.

LORD WATSON (after stating the facts given above, proceeded thus):—

I do not doubt that the appellant, and the servants of the respondents, though engaged in different departments of work, were yet employed in furtherance of the common end of completing the block of dwelling-houses. Nor do I doubt that, if they had all been servants of the same master, the appellant would in law be held to have accepted the risk of his fellow-servants' negligence, and could have had no claim for reparation, except against the workman who injured him. But there is, in my opinion, no ground for the suggestion that the respondents' servants were, in any sense whatever, the servants of Higgs & Hill, and therefore fellow-servants of the appellant.

(1) 4 Sc. Sess. Cas. 4th Series 469.

The case was tried before Mr. Justice Grantham and a jury, who found for the plaintiff and assessed damages at £52 10*s*. Their verdict was set aside and judgment entered for the respondents by Baron Pollock and Mr. Justice Manisty, following what they conceived to be a principle established by the decision of the Court of Exchequer in *Wiggett* v. *Fox* (1). The learned Baron held it to be sufficient for the exoneration of the respondents that the appellant and their servants, though not necessarily fellow-servants, were fellow-workmen in such a sense that the master of any one of them who negligently injured a fellow workman was not responsible for his negligent act; and he states the doctrine of *Wiggett* v. *Fox* (1) to be that, "If the person suing is a fellow-labourer with the man whose immediate act occasions the injury, then there is no implied contract on the part of the master to recoup for any damage which he may suffer from that negligence." Mr. Justice Manisty was of opinion that the present case could not be distinguished from *Wiggett* v. *Fox* (1), and he added, "if anything, in the present case the facts are stronger in my view to shew that the persons employed upon this building were all under the control of the architect of the building owner."

On appeal, Lords Justices Cotton and Lopes, Lord Justice Fry dissenting, affirmed the decision of the Divisional Court. Lord Justice Lopes, who delivered the judgment of the majority, states that in their opinion the respondents "became sub-contractors under Higgs & Hill, and were, together with the men directly employed by them, in the employment and under the general control of Higgs & Hill, working together for one common object, i.e., the carrying out of Higgs & Hill's contract, and taking upon themselves all the risks naturally incident to the work they had undertaken." That the learned judges meant to rest their decision upon that basis of fact is evidenced by their statement: "We know of no case where it has been held that a man is liable for an injury caused by his servant, when the man doing the injury and the injured man are to be considered as employed in the work of another who is the common master of both."

(1) 11 Ex. 832; 25 L. J. (Ex.) 188.

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I do not think it necessary to discuss the question under what circumstances the servant of one man ought to be considered the servant of another; I can well conceive that the general servant of A. might, by working towards a common end along with the servants of B. and submitting himself to the control and orders of B., become pro hac vice B.'s servant, in such sense as not only to disable him from recovering from B. for injuries sustained through the fault of B.'s proper servants, but to exclude the liability of A. for injury occasioned, by his fault, to B.'s own workmen. In order to produce that result the circumstances must, in my opinion, be such as to shew conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master, for the purposes of the common employment. To my mind, there is not, in this case, a tittle of evidence to shew that the respondents' workmen agreed to submit or were in point of fact subjected to the control either of Higgs & Co., or of Mr. Burden, the architect. I am, therefore, unable to assent to the assumption upon which the judgment of the Court of Appeal proceeds.

I am also unable to assent to the legal doctrine which found favour with the Divisional Court, and was pressed upon us in the argument for the respondents. I do not agree with Baron Pollock, that the rule which exempts a master from liability to his servant for injuries negligently occasioned by a fellow-servant in the course of their common employment rests upon the absence of an implied contract by the master to recoup such damage. The master's responsibility for his servant's acts has its origin in the maxim, "Qui facit per alium facit per se," which has been construed as inferring his liability for what is negligently done by the servant acting within the scope of his employment. The immunity extended to a master in the case of injuries caused to each other by his servants whilst they are working for him to a common end is an exception from the general rule, and rests upon an implied undertaking by the servant to bear the risks arising from the possible negligence of a fellow-servant who has been selected with due care by his master.

I am of opinion, with Lord Justice Fry, that, in order to raise

the exemption, there must not only be common employment but a common master; and that the respondents are liable, because, in this case, although there was common employment, there was no common master.

The principle of the master's immunity in such cases, frequently termed the doctrine of collaborateur, is of comparatively recent origin. In the law of England it can hardly be traced further back than *Priestley* v. *Fowler* (1), which was decided in 1837. It was rejected by the Courts of Scotland until 1858, when, for the first time in either country, it was fully explained and reduced to its proper limits by Lord Cranworth, in the Scotch case of *Bartonshill Coal Company* v. *Reid* (2). The doctrine had previously been formulated by the Supreme Court of Massachusetts, in a judgment delivered by Chief Justice Shaw, in *Farwell* v. *Boston and Worcester Rail Road Corporation* (3), which was referred to with approval by Lord Cranworth. It is needless to quote passages from the opinions of Lord Cranworth and Chief Justice Shaw, which are now so familiar to professional lawyers. It is sufficient to say that in my opinion the rule, as laid down by these eminent judges, is strictly confined to the case of common employment under a common master, and that the reasons which they assign for the introduction of the rule have no application to any other case.

Counsel for the respondents relied upon three decisions, two of them Scotch, as authorities for the extension of the doctrine to cases where there is no common master, but common employment for a common object.

The first of these cases is *Wiggett* v. *Fox* (4), as to which I can only say that, if it must be taken to establish the proposition maintained by the respondents, I could have no hesitation in holding that it was not decided according to law. But Baron Channell subsequently explained that he assented to the judgment because he thought Fox & Co. had control over Wiggett; by which he probably meant that the relation of servant and master did actually exist between Wiggett and Fox & Co. If that be taken as the true ground of the decision, it does not

(1) 3 M. & W. 1.
(2) 3 Macq. 266.
(3) 4 Metcalf, 49.
(4) 11 Ex. 832.

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support the argument of the respondents, but comes within the rule enunciated by Lord Cranworth.

The next case is *Woodhead* v. *Gartness Mineral Company* (1), which was decided in 1877 by a majority of six to one of the Inner House judges of the Court of Session, the late Lord Justice Clerk (Lord Moncrieff) being the sole dissentient. It does appear to me that the decision goes the full length of affirming that, in cases of common employment under different masters, each master is freed from responsibility for injuries inflicted upon the workmen of other masters by the negligence of his servants. The Lord President (Inglis), whose views are in substantial agreement with those of the five learned judges who came to the same conclusion with him, said: "If two miners are employed and paid by the same master, and while they are hewing at one working face the one by negligence injures the other, the master is not answerable, because it is said they are engaged in a common employment—that is to say, they are engaged in the same work as servants of the same master. But if the legal principle were applicable to this case only, it would cease to be a principle, and degenerate into a mere artificial and arbitrary rule. It is not because the wrongdoer is, in a technical sense, the servant of the same master that the master is not answerable. It is of no moment to the injured workman whether his injury be caused by a servant of the same master or by one who has undertaken some function in the mine upon what is called an independent contract. The injury in either case is the same. The personal liability of the wrongdoer is the same. But the mineowner is free from responsibility, not because the injured and the injurer are both his own hired and paid servants, but because he is not personally in fault, and has not warranted the injured workman against the perils of the work."

In the third case relied on by the respondents, namely, *Maguire* v. *Russell* (2), one tradesman had contracted to execute plumber work and another to lay asphalte pavement in the same building. They proceeded to work under independent contracts, and in the course of their operations a workman engaged in asphalting was injured by a hammer which fell through a sky-

(1) 4 Sc. Sess. Cas. 4th Series, 469. (2) 12 Sc. Sess. Cas. 4th Series, 1071.

light in the roof through the negligence of one of the plumber's servants, and the injured man brought an action of damages against the plumber. It was not alleged in defence that the two men were working under the same master, but the Second Division of the Court assoilzied the defender, on the ground that the case was not distinguishable from *Woodhead* v. *Gartness Mineral Company* (1).

Notwithstanding the eminence of the judges constituting the majority of the Court in *Woodhead* v. *Gartness Mineral Company* (1), I am constrained to differ from the law which they laid down. It appears to me to carry the immunity of masters far beyond the very precise limits assigned to it by the decisions of this House, and I have, therefore, no hesitation in affirming that it is not the law of England.

I think it right to say that, in my opinion, certain observations made by the Lord Chancellor (Cairns) in the Scotch case of *Wilson* v. *Merry & Cunningham* (2) were construed by some, if not all, of the majority in *Woodhead* v. *Gartness Mineral Company* (1), in a sense which the noble and learned Lord never intended them to bear. But, in order to appreciate the real purport and effect of these observations, it is necessary to advert to the previous course of judicial decisions in Scotland upon the question of a master's liability and to the single point which the House had to determine in *Wilson* v. *Merry & Cunningham* (2).

Down to the date of the judgment of this House in the Bartonshill cases, the Court of Session declined to accept the doctrine of collaborateur as part of the law of Scotland, and held the liability of a master for his servant's fault to be the same in the case of a fellow-servant as of a stranger. After the doctrine was authoritatively declared to be Scotch law, the Court of Session for some time construed the word "collaborateur" in its strictest sense, as signifying a fellow-servant who laboured with his hands. In pursuance of that technical interpretation, it was held by the First Division in *McAulay* v. *Brownlie* (3) and in *Somerville* v. *Gray* (4) that a manager or foreman, who merely superintended and did no manual work, was not a collaborateur within the

(1) 4 Sc. Sess. Cas. 4th Series, 469.
(2) Law Rep. 1 H. L., Sc. 326.
(3) 22 Sc. Sess. Cas. 2nd Series, 975.
(4) 1 Sc. Sess. Cas. 3rd Series, 768.

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meaning of the rule, and, consequently, that the common master was responsible for injury to a fellow-servant arising from his negligence; whereas, in *Wright* v. *Roxburgh* (1), it was decided by the Second Division that the underground manager of a colliery who, with his own hands, broke down part of a ventilating apparatus, and thereby caused an explosion of fire-damp which injured a workman in the service of his master, was a collaborateur, and that the master was free of liability. *Wilson* v. *Merry & Cunningham* (2) was, in its circumstances, on all-fours with *McAulay* v. *Brownlie* (3) and *Somerville* v. *Gray* (4), but the First Division, of which the present Lord President had then become the head, unanimously held that the manager or sub-manager of a pit were fellow-workmen, engaged in the same common employment with the miners; and therefore came to the conclusion that the master was not liable. In moving the affirmance of the judgment, the Lord Chancellor (Cairns), after citing the opinion of Lord Cranworth in *Bartonshill Coal Company* v. *Reid* (5), went on to say: "I would only add to this statement of the law, that I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense the fellow-workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred the negligence has, no doubt, been the negligence of a fellow-workman; but the case of the fellow-workman appears to me to be an example of the rule, and not the rule itself" (6). That language appears to have been regarded by the Court of Session as justifying the inference that the rule ought not to be confined to fellow-servants of the same master—a construction which ignores the fact that the noble and learned Lord was professedly speaking of the "liability or non-liability of the master to his workmen," and was dealing with no other subject. I do not doubt that the language of the noble and learned Lord was simply intended to express his opinion, that to hold a fellow-servant who was in a sense the alter ego of the master, and who directed, but did not labour in,

(1) 2 Sc. Sess. Cas. 3rd Series, 748.
(2) Law Rep. 1 H. L., Sc. 326.
(3) 22 Sc. Sess. Cas. 2nd Series, 975.
(4) 1 Sc. Sess. Cas. 3rd Series, 768.
(5) 3 Macq. 266.
(6) Law Rep. 1 H. L., Sc. 331, 332.

the common employment, was not a collaborateur, was a strained and technical interpretation of the rule.

I concur in the compendious definition of the principle upon which the master's non-liability rests, which was given by my noble and learned friend, Lord (then Mr. Justice) Blackburn, in *Howells* v. *Landore Steel Company* (1), six years after the decision of this House in *Wilson* v. *Merry & Cunningham* (2). His Lordship said in that case: "It is a rule of law that the master who employs a servant (not an agent) is responsible for the negligence of that servant in matters in which he is employed; but there is this exception, which has been established by a series of decisions, that with regard to a fellow-servant the master is not held so responsible, because this negligence is to be taken as one of the ordinary risks which the servant contemplates and undertakes when entering into his employment."

For these reasons, I concur in the judgment which has been proposed by my noble and learned friend on the woolsack.

LORD MORRIS:—

My Lords, I also concur.

Orders of the Queen's Bench Division and the Court of Appeal reversed and judgment for the plaintiff restored; the respondents to pay the costs in the Courts below and in this House; the appellant's costs in this House to be taxed in the manner usual when the appellant sues in formâ pauperis: Cause remitted to the Queen's Bench Division.

Lords' Journals 28th July 1891.

Solicitors for appellant: *Langlois & Biden.*
Solicitors for respondents: *Finch & Turner.*

(1) Law Rep. 10 Q. B. 64. (2) Law Rep. 1 H. L., Sc. 326.

[HOUSE OF LORDS.]

H. L. (E.) 1891 *July* 30.

THOMAS JOHN BARNARDO . . . . APPELLANT;

AND

MARGARET McHUGH . . . . . RESPONDENT.

Practice—Appeals from Divisional Court—Habeas Corpus—Custody of Infant—Illegitimate Child—Guardianship—Rights of Mother of Illegitimate Child.

An appeal lies from an order of the Queen's Bench Division directing the issue of a writ of habeas corpus to bring before the Court an infant in order to determine who is to have the custody of and control over such infant.

In determining who is to have the custody of and control over an illegitimate child the Court in exercising its jurisdiction with a view to the benefit of the child will primarily consider the wishes of the mother.

The decision of the Court of Appeal ([1891] 1 Q. B. 194) affirmed.

Reg. v. *Nash* (10 Q. B. D. 454) approved.

By Lords Herschell and Field: The authorities do not establish the proposition that the legal rights of the mother of an illegitimate child as to its custody are the same as those of the father of a legitimate child.

APPEAL from two orders of the Court of Appeal, one as to the issue of a habeas corpus, and the other as to the appointment of a guardian, reported as *Reg.* v. *Barnardo, Jones's Case* (1). The circumstances were as follows:—

The respondent, Margaret McHugh (formerly Roddy), was the mother of an illegitimate boy (called John James Roddy, and sometimes Jones,) by a man named Jones with whom she lived for about twenty years. The boy was born in December 1878, baptized in a Roman Catholic church in 1880, and again baptized in a Protestant church in 1884. In 1886 the respondent married a man named McHugh. In June 1888 the boy was admitted into one of the Homes for Destitute Children, of which the appellant, Dr. Barnardo, was the founder and director under a committee, the mother signing an agreement to leave the boy under the care of the managers of the Homes to be maintained and educated for twelve years, and not to remove him during that period without their consent. In January 1890 the appellant was required, in accordance with an authority signed by the

(1) [1891] 1 Q. B. 194.

mother, to deliver the boy to a person named by her. The appellant having after some correspondence refused to do so, a rule nisi was obtained calling on him to shew cause why a writ of habeas corpus should not issue commanding him to bring up the body of the boy before the Court.

The Queen's Bench Division (Lord Coleridge C.J. and Mathew J.) after argument made this rule absolute and also made an order appointing a Mr. Walsh, a Roman Catholic, nominated by the mother, guardian of the person of the boy. Both these decisions were affirmed by the Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ. (1)). Affidavits were used in the Courts below as to the character, reputation, and religious opinions of the mother, as to her bona fides in taking these proceedings, as to the wishes and welfare of the boy, and as to all the circumstances surrounding the case, and several of the deponents were cross-examined. This evidence is referred to in some detail in the report of the decisions below (1). For the present purpose it is enough to say that their Lordships in this House took substantially the same view of the facts as that taken by the Court of Appeal. It was admitted that the object of the mother—or those by whom she was influenced—was to have the boy brought up as a Roman Catholic; while the desire of Dr. Barnardo was to have him brought up as a Protestant.

The present appeal was against both the orders made by the Court of Appeal. Upon the argument a preliminary objection was mentioned, raising the question whether an appeal lies to the Court of Appeal from an order of the High Court for the issue of a writ of habeas corpus commanding a person to bring up the body of a child in whose care he is, the point taken by the respondent being that the decision of this House in *Cox* v. *Hakes* (2) applied in the case of the guardianship of an infant, and shewed that no appeal lay. That question was not argued on this appeal, a similar objection having been already argued on the 24th of April in the preceding appeal of *Barnardo* v. *Ford* (3), in which their Lordships took time for

(1) [1891] 1 Q. B. 194.
(2) 15 App. Cas. 506.
(3) The appeal was from a decision of the Court of Appeal, reported as *Reg.* v. *Barnardo, Gossage's Case*, 24 Q. B. D. 283.

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consideration on the preliminary objection without hearing the merits. On the present appeal the merits were discussed irrespective of the preliminary objection, there being an order for the appointment of a guardian, to which that objection did not apply. The question of the right of appeal was dealt with by the Court of Appeal (1) and also by Lord Halsbury L.C. in his judgment in the present case.

April 24, 27. *Finlay* Q.C. and *W. Baker* for the appellant:—

The main question involved in this appeal is as to the rights of the mother of an illegitimate child with respect to its guardianship. The novel doctrine seems to have been propounded that the mother's rights are on a par with those of the father of a legitimate child. There is no authority for this proposition; the cases referred to in argument before the Court of Appeal do not establish it and are in fact inconsistent with it. In the case of a bastard, no person has all the rights of a guardian: *In re Ullee* (2). "Neither the putative father nor the mother of an illegitimate child has the legal right of guardianship": Macpherson on Infants, p. 67, citing *R.* v. *Felton and Wenman* (3). That the mother has no legal right to the custody, nor to appoint a guardian, nor any absolute rights at all appears from the old authorities, e.g. *R.* v. *Hopkins* (4); where the Court restored the child to its mother, but the child was within the age of nurture and would seem to have been of very tender years. *In re Lloyd* (5) is a strong authority in favour of the appellant, the Court there refusing to compel an illegitimate child of eleven or twelve years old to live with its mother against its will. Maule J. there said, "How does the mother of an illegitimate child differ from a stranger?" Other cases relied on contrà by the respondent do not help the argument. In *R.* v. *Soper* (6) the child was restored to its mother; but it was three years old and the mother had been deprived of the child by fraud. So in *R.* v. *Moseley* (7);

(1) [1891] 1 Q. B. 194.
(2) 53 L. T. (N.S.) 711; 54 L. T. (N.S.) 286.
(3) 1 Bott and Const.'s Poor Laws, 5th Ed. p. 478, pl. 629.
(4) 7 East, 579.
(5) 3 M. & G. 547.
(6) 5 T. R. 278.
(7) 5 East, 224, n.

see also *Reg.* v. *Combs* (1). In *Reg.* v. *Clarke* (2) guardianship by nurture was discussed, and Lord Campbell said that it was clear that the mother of a bastard has not over it all the rights of guardian for nurture; he also pointed out that from what was said by Lord Ellenborough in *R.* v. *Hopkins* (3) it would appear that it is only while an illegitimate child is under seven that the Courts will interfere to protect the custody of the mother. In *Ex parte Knee* (4), cited by Jessel M.R. in *Reg.* v. *Nash* (5), the mother is no doubt spoken of as "entitled to" the child, but the age is not mentioned in the report, and it may have been of tender years. But conceding that the mother may have some rights, the principal consideration is what is for the best welfare of the child. This is what has always guided Courts of Equity in determining questions of guardianship, and now all the Courts are governed by equitable rules. All the circumstances must be considered. Of her own free will the mother placed the boy with the appellant to be brought up in the Protestant faith, and bound herself by agreement for twelve years. It is too late now to change her mind and ask the Court to sanction the change: *Stourton* v. *Stourton* (6); see also *Lyons* v. *Blenkin* (7); *Andrews* v. *Salt* (8); and *In re Agar-Ellis* (9). The affidavits shew that the mother has no real religious views: that she is acting not bonâ fide from her own impulse but influenced by others who have their own ends to serve. Under all the circumstances it is for the real welfare of the child to leave him where he is.

Murphy Q.C. and *Joseph Walton* (*Forbes Lankester* with them) for the respondent:—

The view taken by the Court of Appeal of the facts is the correct one. The authorities shew that the mother of a bastard has all the same rights as the father of a legitimate child. But it is not necessary to maintain that proposition. It is enough

(1) 5 E. & B. 892.
(2) 7 E. & B. 186, 198.
(3) 7 East, 579.
(4) 1 B. & P. (N.R.) 148.
(5) 10 Q. B. D. 454.
(6) 8 D. M. & G. 760.
(7) Jac. at p. 262.
(8) Law Rep. 8 Ch. 622, 638.
(9) 24 Ch. D. 317.

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to shew that she has a natural right to the guardianship, unless she has done something to deprive herself of it, or unless it is for the manifest injury of the child to deliver him to her. This is not the case of a capricious change of mind. The mother had the right in the first instance to place the boy with the appellant. She has an equal right to change her mind and place him elsewhere. The agreement with the appellant could not bind her. She could not by any means deprive herself of her natural rights and duties. That the Legislature has frequently recognised the rights and duties of the mother of a bastard appears from several statutes. By the Poor Law Act of 1834 (4 & 5 Wm. 4, c. 76), s. 71, a bastard follows the settlement of its mother until the age of sixteen or the acquisition of a settlement in its own right, and the mother while unmarried or a widow is bound to maintain the child till the age of sixteen. If the mother is liable for its maintenance how can it be said that she is not legally entitled to its custody? Sect. 57 deals with the liability of a man to maintain the children, legitimate or illegitimate, of a woman whom he marries, and the respondent is in the present case acting with her husband who is liable to maintain the child. The liabilities of the mother were again dealt with by 7 & 8 Vict. c. 101, ss. 5, 6. See also the Reformatory Schools Act 1866 (29 & 30 Vict. c. 117) s. 25 and the Industrial Schools Act 1866 (29 & 30 Vict. c. 118) ss. 16, 39; 30 & 31 Vict. c. 84, ss. 16, 35; and 31 & 32 Vict. c. 122, s. 23. Guardianship by nurture was recognised from very early times; Com. Dig. "Guardian by Nurture," D, vol. 4, p. 381. That the mother of a bastard is primâ facie at all events entitled to the care and custody is distinctly decided in *Ex parte Knee* (1), and *Reg.* v. *Nash* (2). Those authorities are sufficient for the present purpose. They are not in conflict with the cases relied on contrà where the latter are examined. As to the saying of Maule J., relied on by the appellant, it is only a dictum and was probably ironical. If it was meant seriously, it is not supported by any authority whatever, and is inconsistent with the decisions already cited and with the statutes which create or declare duties and thereby imply correlative rights. The evidence shews that the

(1) 1 B. & P. (N.R.) 148. (2) 10 Q. B. D. 454.

mother's wishes (which are at all events primarily to be considered) and the welfare of the child in this case coincide.

Finlay Q.C. replied.

The House took time for consideration.

July 30. LORD HALSBURY L.C.:—

My Lords, I cannot entertain a doubt that there was nothing in the decision of this House in the case of *Cox* v. *Hakes* (1) which is inconsistent with the right of appeal in this case. It seems to me to be clear that upon a question which is practically the guardianship of a child there is still, as there always has been, a right of appeal, and that the mere fact that the process by which that question is initiated is by writ of habeas corpus does not affect that right of appeal. It is not necessary to do more than point out the reasoning of this House in the case to which I have referred to shew that the objections there entertained to the existence of any right of appeal are entirely beside any question which arises in the proceedings now before your Lordships.

My Lords, upon the facts of this case I desire to adopt the view of them that has been stated by the Master of the Rolls. That Dr. Barnardo is engaged in very excellent work, that this particular child was taken to his Home by the desire of the mother, and that the child was well treated while in his Home, there seems to be no doubt.

The first question raised seems to be as to whether or not this is in truth an application by the mother, or whether she is being used by other persons (who have been described as a rival proselytizing society) as their instrument for taking the child away from a Protestant education to that of a Roman Catholic training. My Lords, it seems to me there is no foundation for saying that this is not a bonâ fide application by the mother herself. She may be unreasonable; she may be ungrateful; but that she was really affronted at the Home when she went to see her child, and that she now really herself desires that her child should no

(1) 15 App. Cas. 506.

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longer remain in Dr. Barnardo's school, seems to me perfectly clear. I cannot forbear from saying that, taking the mother's account of what happened when she applied to see her child, I am not surprised that she should have been affronted and angry; and considering the state of destitution from which Dr. Barnardo rescued the child and the written agreement under which it was taken into his Home, I am not surprised that he should be angry at the endeavour to remove it. I certainly could wish that his letters on the subject had been a little less flippant; but, after all, the question which this House has to determine is whether or not under the circumstances of this case Dr. Barnardo is entitled against the will of the mother to retain the child in his Home. That question, as I have already intimated, does not raise the question of unlawful detention at all. It is the question of whose is the rightful guardianship, or at all events what order the Court ought to make in respect of guardianship upon the facts of this case. It is clear that the written agreement with Dr. Barnardo cannot determine that question. It is equally clear that but for the circumstance of the child being illegitimate there would be no doubt as to what order should be made. The question is whether that circumstance is conclusive against the mother on her present application.

My Lords, I doubt very much whether any absolute rule can be laid down; but in *Reg.* v. *Nash* (1) this very question came for decision before the Court of Appeal, and Sir George Jessel appears to me to have pointed out the distinction between strict legal rights as to guardianship and the jurisdiction which a Court of Equity does and always did exercise in regard to such orders as are now in question. Sir George Jessel pointed out that that Court is now governed by equitable rules and that in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Natural relationship was thus looked to with a view to the benefit of the child. "There is in such a case" (he says) "a sort of blood relationship which, though not legal, gives the natural relations a right to the custody of the child." His Lordship, I think, did not mean an absolute right; but such a right as he had already

(1) 10 Q. B. D. 454.

described to be considered by a Court of Equity in making such orders.

Lord Mansfield says much the same thing. In *R.* v. *Felton & Wenman* (1), on motion for an information against the defendants for taking away a bastard child from its mother and delivering it to the father, a man of fortune, his Lordship said: "Neither the putative father nor mother had the legal right of guardianship; and if the putative father, having an order of bastardy made on him to contribute to the maintenance of the child, has a mind to take the child and provide for it, the parish cannot insist on his paying towards the maintenance while in his custody; and that he thought in this case, where the justice had ordered the child to be delivered to the mother, he (the justice) had done wrong, the father being in good circumstances and the mother poor; and that the circumstances of the parents should direct in these cases."

Lord Cottenham, in his answer to the suggestion that a Court of Equity only interfered on behalf of infants where there was property in question, said he had no doubt about the jurisdiction to interfere quite independently of property, and he drew this distinction: "Courts of law" (said he) "interfere by habeas for the protection of the person of *anybody* who is suggested to be improperly detained. This Court" (that is to say, a Court of Equity) "interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as parens patriæ, and the exercise of which is delegated to the Great Seal": see *In re Spence* (2).

It is clear further that the law has placed upon the mother of an illegitimate child obligations which ought to, and, in my opinion, do, bring with them corresponding rights. Whether the right is, as Lindley L.J. expresses it, a primâ facie right to the custody of the child, or whether it be the settled view of the Court of Equity that the mother's wishes ought to be consulted, if she has not forfeited the right to be consulted by any misconduct of her own, seems to me to be immaterial to decide, since I am of opinion that no misconduct is established against

(1) Easter, 31 Geo. 2. MSS. cited in 1 Bott and Const.'s Poor Laws, 5th Ed. p. 478, pl. 629.

(2) 2 Ph. 247, 252.

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this mother which disentitles her to exercise her right to be considered in respect of the custody of this child.

I am, therefore, of opinion that the order of the Court of Appeal ought to be affirmed, and this appeal dismissed with costs, and I move your Lordships accordingly.

LORD HERSCHELL :—

My Lords, in this case the Queen's Bench Division on the 5th of August 1890 made absolute an order that a writ of habeas corpus should issue commanding the appellant to have the body of an infant called Roddy before the judge at chambers immediately after the receipt of the writ. It was ordered that the writ should lie in the office until further order, and that Margaret McHugh should be at liberty to apply to the judge in chambers for the appointment of a guardian. On the 4th of November the Court appointed Mr. Walsh to be guardian of the child. Both these orders were affirmed by the Court of Appeal on the 25th of November.

The circumstances which have given rise to the controversy appear to be these : In the year 1888 a lady who was a district visitor connected with Emanuel Church applied to the appellant for the admission to his Homes of a boy named John James Roddy who attended the schools belonging to that church. The boy was the illegitimate son of Margaret McHugh, by a man named Jones, with whom she cohabited for twenty years. A few years ago she married her present husband. On the 19th of June the boy was admitted into the Home, the mother signing an agreement to leave the child under the care of the managers for twelve years. Early in the year 1890 the appellant was required, in accordance with an authority signed by the mother, to hand the child over to a person named by her, and on his refusal to do so the present proceedings were instituted.

The question principally discussed at your Lordships' Bar was whether the mother of an illegitimate child has a legal right to its custody. It was contended on behalf of the appellant that she has no such right ; whilst on the other side it was argued that her rights are the same as those which a father possesses with regard to his legitimate children. In the Courts below the latter pro-

position appears to have been considered to be established by the authorities. I do not feel satisfied that the authorities do establish that proposition.

It is true that in the case of *Ex parte Knee* (1), where application was made for a writ of habeas corpus with a view to delivering to its mother the custody of an illegitimate child who had been placed with a third person by the putative father, Mansfield C.J. said that the mother was entitled to the child if she insisted on it, unless some ground was shewn by the affidavits to prevent her having the custody; but in the case of *R.* v. *Moseley* (2), which came before the Court about the same time, Lord Kenyon said: "Where the father" (he was speaking of the putative father of an illegitimate child) "has the custody of a child fairly, I do not know that this Court would take it away from him; but where he has got possession of the child by force or fraud, as is here suggested, we will interfere to put matters in the same situation as before." The same learned judge had in a previous case of *R.* v. *Soper* (3) restored a child to the custody of a mother at her instance where the putative father had obtained possession of it by fraud. I do not gather that in either of these cases Lord Kenyon acted upon the view that the mother of an illegitimate child had an absolute legal right to its custody, but only that the Court would intervene where she had been deprived of that custody by force or fraud; and in the case of *R.* v. *Hopkins* (4), two years after the decision of Sir James Mansfield in *Ex parte Knee* (1), where a writ of habeas corpus was moved for by the mother of an illegitimate child which had been taken from her custody by force, Lord Ellenborough expressed some doubt, upon the opening of the case, "whether the Court could interfere on behalf of the mother of an illegitimate child, who had no legal right to the person of the child," and said that "the question of guardianship belonged to another forum, with which this Court could not interfere." On the following day, in granting the writ, Lord Ellenborough said: "We think that this is a proper occasion for the Court by means of a remedial writ to restore the child to the same

(1) 1 B. & P. (N.R.) 148.
(2) 5 East, 224, n.
(3) 5 T. R. 278.
(4) 7 East, 579.

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quiet custody in which it was before the transactions happened which are the subject of complaint; leaving to the proper forum the decision of any question touching the right of custody and guardianship of this child, with which we do not meddle."

In the case of *Reg.* v. *Nash* (1), to which I shall have occasion to refer hereafter, it was not necessary, as was there pointed out, to determine whether the mother of an illegitimate child had, according to the common law, a right to its custody, the Court exercising an equitable as well as legal jurisdiction, and being governed by the rules of equity.

It seems to me that there was in former times a disposition to carry out rigorously to its logical conclusion the doctrine that an illegitimate child was filius nullius, and to hold that no one possessed in relation to it the full parental rights which the law recognises in the case of legitimate offspring. When Maule J., in the case of *In re Lloyd* (2), asked, "How does the mother of an illegitimate child differ from a stranger?" it does not appear to me that he was speaking ironically, but rather stating bluntly this legal doctrine. But whatever may have been the view in former times, I cannot but think that the legislation embodied in the Poor Law Act (4 & 5 Will. 4, c. 76, s. 71) renders it impossible in the present day to regard the mother of an illegitimate child as destitute of any rights in relation to its custody. The obligation cast upon the mother of an illegitimate child to maintain it till it attains the age of sixteen appears to me to involve a right to its custody.

It is, however, no longer important to inquire what are the rights of the mother in relation to an illegitimate child at common law. All the Courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction. As was said by Sir George Jessel M.R., in *Reg.* v. *Nash* (1): "In equity regard was always had to the mother, putative father, and relations on the mother's side." In that case the mother of an illegitimate child sought to have it delivered to her in order that it might be placed under the care of her sister. The child was in the custody of the wife of a labouring man, with whom it had been placed by

(1) 10 Q. B. D. 454. (2) 3 M. & G. 547.

the mother, who was living with another man as his mistress. The Court, notwithstanding the opposition of the person in whose custody it was, ordered that the child should be delivered into the custody desired by the mother. I think this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shewn that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the Court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother.

The principles on which the Court ought to act on the application for the custody of an illegitimate child being thus, to my mind, free from doubt, I proceed to inquire how they ought to be applied to the present case. It has been suggested that the application for the habeas corpus was not really made by or on behalf of the mother, that she was merely put forward by other persons who were desirous of seeing the child transferred from Protestant to Roman Catholic guardianship. I will, therefore, state the impression produced on my mind by the evidence which was given before the Court below. That the mother was at one time indifferent whether the child was brought up as a Protestant or a Catholic, cannot be doubted. The child was baptized in a Roman Catholic chapel on the 11th of April 1880, and was again baptized as a Protestant on the 12th of November 1884, the mother herself taking the boy to be so baptized. She afterwards caused him to attend a Protestant school where he remained until he was received into the institution founded by the appellant.

I think it clear that the present proceedings had their origin in the irritation of the mother, caused by a refusal to allow her to see her child, and her inability to ascertain his exact whereabouts. That Mrs. McHugh was distressed at being unable to see or hear from her son is spoken to by witnesses whose evidence is above suspicion. I have no doubt that the appellant and those in charge of his institution acted in perfect good faith in the course they took, nor am I concerned to inquire into the

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sufficiency or otherwise of the reasons which led them to refuse her access to her child. I am dealing only with the motive which induced the action taken by the mother. It is, I think, manifest that, being irritated at access to her child having been denied her, she communicated on the subject with her niece, Rose Farrington, who was a Roman Catholic, and was by her introduced to a Catholic priest; and I think it probable that Mrs. McHugh, having been herself a Roman Catholic, was persuaded that she was doing wrong in permitting her child, who had been originally baptized as a Roman Catholic, to be educated as a Protestant. I therefore cannot regard the application for the habeas corpus as made otherwise than by her.

This being so, the sole question for determination appears to me to be whether it would be prejudicial to the child's interests if it were delivered into the custody desired by the mother. No personal exception was taken, or indeed could be, to the guardian appointed by the Court, in whose custody the child will remain if the wishes of the mother be given effect to. But the result will, no doubt, be to transfer its training from Protestant to Roman Catholic hands. Is that a sufficient reason for refusing to accede to the mother's desire? It would be obviously improper for the Courts to manifest or act upon any preference for the one religion over the other in a case of this kind. The decision must be the same as if the application were to transfer the child from Roman Catholic to Protestant guardianship. There may, perhaps, be cases where, in view of the age and past training of the child, the Court might come to the conclusion that a transfer of it from one religious institution to another would be so prejudicial to its interests as to render it right to disregard the wishes of the parent. But, on a review of all the circumstances of this case, I feel it impossible to hold that to comply with the wishes of the mother would be so injurious to the child as to justify our disregarding them.

For these reasons I think the judgment ought to be affirmed. I am desired by my noble and learned friend Lord Field, who is unable to be present, to say that he has read the opinion I have just delivered and entirely concurs in it.

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. LORD HANNEN :—

My Lords, I have nothing to add except that I concur.

Orders appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 30th July 1891.

Solicitors for appellant: *H. C. Nisbet & Daw.*
Solicitors for respondent: *Leathley & Willes.*

[HOUSE OF LORDS.]

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DAVID M'COWAN . . . . . APPELLANT;

AND

BAINE AND JOHNSTON AND OTHERS . . RESPONDENTS.

THE "NIOBE."

Insurance (Marine)—Collision Clause—Vessel under Tow—Collision with Tug—Construction of Policy.

By a policy of marine insurance the underwriters insured the ship *Niobe* from the Clyde (in tow) to Cardiff $\frac{\text{and}}{\text{or}}$ Penarth while there and thence to Singapore, and while in port for thirty days after arrival; and agreed "if the ship hereby insured shall come into collision with any other ship or vessel and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, any sum or sums of money," &c., to pay the assured a certain proportion of the sum so paid.

While the *Niobe* was being towed to Cardiff her tug came into collision with and sank another vessel, whose owners recovered damages both from the *Niobe* and the tug.

In an action by the owners of the *Niobe* upon the policy against one of the underwriters for payment of his proportion of the sum paid by such owners on account of the collision, the underwriter pleaded that under the policy he was only liable for damage arising from collision with the *Niobe* :—

Held, affirming the decision of the Court of Session (17 Court Sess. Cas. 4th Series (Rettie) 1016) (Lord Bramwell dissenting), that the collision of the tug with the damaged vessel must be taken to have been a collision of the *Niobe* with another vessel within the meaning of the policy, and that the underwriters were liable.

APPEAL from an interlocutor (dated June 20, 1890) of the Second Division of the Court of Session, Scotland (1) affirming

(1) 17 Court Sess. Cas. 4th Series (Rettie) 1016.

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an interlocutor dated 5th February, 1890, of the Lord Ordinary (Trayner), in an action brought by Baine and Johnston and others, shipowners, owners of the sailing ship *Niobe*, the respondents, against David M'Cowan, the appellant, in which the respondents sought to recover from the appellant £60 10*s.* 4*d.*, being the proportion alleged to be payable by him as underwriter on a policy of marine insurance dated the 1st of April, 1887, by which the respondents insured the ship "*Niobe* from the Clyde (in tow)" with the appellant and other underwriters for the sum of £8000.

The facts, and the clause of the policy of insurance in question, are set out in the judgments, and especially in that of Lord Watson.

On appeal,

June 15. *Finlay*, Q.C., and *Joseph Walton*, for the appellant:—

The question is whether the collision with the tug was a collision with the *Niobe*, the vessel in tow, within the meaning of the policy. Such a question cannot depend on the fact that the *Niobe* has been held by the Admiralty Court (1) to have been to blame, as well as the tug, for the collision. If the *Niobe* by a wrong manœuvre had caused two other ships to collide, the damage caused thereby would not be damage done by collision with the *Niobe*. What the underwriters had in view when they signed this policy was a direct physical collision with the vessel *Niobe*.

[They cited *The Quickstep* (2); *American* and *The Syria* (3); *The Cleadon* (4); *The Independence* (5); *The Ticonderoga* (6).]

Sir R. E. Webster, A.G., and *J. Gorell Barnes*, Q.C. (with them, *D. C. Leck*), for the respondents:—

The term "collision" in this policy ought not to be confined to actual collision with the ship insured. To constitute a collision within the meaning of the instrument, there need not be any actual contact between two vessels; for example, if through the

(1) 13 P. D. 55.
(2) 15 P. D. 196.
(3) Law Rep. 4 A. & E. at p. 237; reversed, Law Rep. 6 P. C. 127.
(4) 14 Moo. P. C. Cases, 92.
(5) 14 Moo. P. C. 103.
(6) Swab. Ad. 215.

fault of the *Niobe* another ship was compelled to run ashore to avoid a collision. The cases are summed up in Marsden on Collisions (2nd ed.), p. 101. Secondly, the tug is employed by the tow, and it has been held by Dr. Lushington and Sir James Hannen that tow and tug are to be considered as one ship. And when there is the additional fact that the tug is under control of the tow, as was the case here, collision with the tug is collision with the tow.

Finlay, Q.C., in reply, cited *The Mary* (1).

Judgment after consideration.

July 27. Earl of Selborne:—

My Lords, I cannot help thinking that in construing such a mercantile contract as this, there is as much danger of error in extreme literalism as in too much latitude; and though I do not adopt the argument that a contract of indemnity against the consequences of collision can be extended to a case in which there has been no collision, but only damages caused by measures properly taken to avoid a collision, I think a construction which makes it cover all damages consequent upon an actual collision, for which the assured is liable, is more reasonable and more in accordance with the probable intention of the parties (if the words will bear it) than one which does not.

In the present case, the *Valetta* was sunk by an actual collision, for which the owners of the *Niobe* have been held liable. But the impact which caused the loss of the *Valetta* was not of the hull of the *Niobe*, but of the steam-tug *Flying Serpent*, which was towing the *Niobe* on a part of her insured voyage, described in the policy of insurance as "in tow from the Clyde to Cardiff or Penarth."

The words of this contract are: "If the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall, in consequence thereof, become liable to pay to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money, not exceeding the value of the ship hereby

(1) 5 P. D. at pp. 14, 16.

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assured." If a ship cannot be said to "come into collision with any other ship" except by direct contact, causing damage, between the two hulls (including under the term hull all parts of a ship's structure) there was in this case no such contact, and the appellants ought to succeed.

But I cannot adopt so narrow a construction of those words. I should hold them to extend to cases in which the injury was caused by the impact, not only of the hull of the ship insured, but of her boats or steam launch, even if those accessories were not (as in this case) insured as being, in effect, parts of the ship. I should also hold them to cover an indirect collision, through the impact of the ship insured upon another vessel or thing capable of doing damage, which might by such impact be driven against the ship suffering damage. I should take the same view, as against insurers in similar terms, of a tug towing one or more barges (in which case the barge owners would not be liable for a collision) if damage to any vessel were caused by the barge or barges being driven against it through the improper navigation of the tug, although there might have been no impact of the tug itself upon the injured vessel. And, after full consideration, it seems to me to be no more than a reasonable extension of the same principle to include within them such a case as the present.

Where a ship in tow has control over, and is answerable for, the navigation of the tug, the two vessels—each physically attached to the other for a common operation, that of the voyage of the ship in tow, for which the tug supplies the motive power—have been said, by high authority, to be for many purposes properly regarded as one vessel. Lord Kingsdown's words, in the case of *The Independence* (1), were, that the tug "may, for many purposes, be considered as a part of the ship to which she is attached"; and he went on to repeat the reason given in the earlier judgment reported in the same volume: *The Cleadon* (2), to which he was also a party, where it was said: "The *Cleadon* being in tow of the tug, it is admitted she and the tug must be considered to be one ship; the motive power being in the tug and the governing power in the ship that was being towed." I

(1) 14 Moo. P. C. at p. 115. (2) 14 Moo. P. C. at p. 97.

think the *Flying Serpent* and the *Niobe* may be so regarded for the purpose now in question. The principle on which the *Niobe* has been held liable for the collision seems to me to go far towards that conclusion. That the *Niobe* should be in tow from the Clyde to Cardiff or Penarth was, in the present case, part of the contract. I think the construction ought to be the same, so far as relates to that voyage, as if the words in the margin had been: "If the ship insured, while in tow between the Clyde and Cardiff or Penarth, shall come into collision with any other vessel," &c. If the contract had been so expressed, I should have thought it arbitrary and not reasonable to exclude a collision by the impact of the tug during that voyage upon another vessel, for the consequences of which the owners of the *Niobe* were liable.

I am, for these reasons, of opinion that the interlocutors appealed from are right, and ought to be affirmed.

Lord Watson:—

My Lords, the *Niobe*, a sailing ship belonging to the respondents, was covered by a policy of insurance at and from "the Clyde (in tow) to Cardiff $\frac{\text{and}}{\text{or}}$ Penarth, while there, and thence to Singapore, and while in port for thirty days after arrival." Provision was made for indemnity against liabilities arising from collision by a marginal clause, upon the construction of which the result of this appeal must depend.

Whilst the *Niobe* was on her way to Cardiff in tow of the *Flying Serpent*, her tug came into collision with the *Valetta*, causing her serious damage. The *Valetta*, after colliding with the tug, also came into contact with the *Niobe*, but without receiving any injury. In a suit before the Admiralty Court of England, it was decided by Lord Hannen, that the collision was due to the fault of the tug in not porting her helm, in terms of the regulations, and that the *Niobe* was likewise to blame, in respect of her failure to keep a look-out, and to control the steerage of her tug. The respondents have, in consequence, paid £12,909 odd to the owners of the *Valetta*, and they now sue one of the underwriters of the policy, for his proportion of the sum which they claim by way of indemnity.

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The legal liability of the *Niobe*, and the facts upon which it rests, as these were found by the President of the Admiralty Court, are matter of mutual admission in this case. Whether the collision between the *Flying Serpent* and the *Valetta* was a collision within the meaning of the marginal clause of the policy, is the only subject of controversy.

The material part of the clause is in these terms: "And it is further agreed, that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum not exceeding the value of the ship hereby assured, we will severally pay the assured such proportion," &c. Then follows a stipulation that, in the same events, in cases where the liability of the ship has been contested with their consent in writing, the insurers will also pay a proportion of the expenses incurred or paid by the insured. Lastly, there is a proviso to the effect that the clause shall not extend to any sum which the assured may become liable to pay or shall pay "in respect of loss of life or personal injury to individuals for any cause whatsoever."

The clause is certainly not conceived in the terms which one would have expected the parties to employ, if, as the Attorney-General argued, it was their intention to include in the indemnity all liabilities arising from collision which the *Niobe* could possibly incur. The condition, which must be purified before any obligation can attach to the underwriters, is "that the ship hereby insured shall come into collision with" another ship or vessel. These words, in their literal sense, import that there must be contact between the *Niobe* and such other ship or vessel, causing damage to the latter.

There are many ways in which a ship under sail may, without being herself in collision, become liable to bear the whole damages resulting from a collision. Her unjustifiable manœuvre may occasion the colliding of two or more vessels, other than herself, without any blame on their part; and, in that case, the offending ship, and she alone, is responsible for the consequences of her fault. In such a case I should not be prepared to hold

that the *Niobe* had, in the sense of the policy, "come into collision with" the vessels whom she caused to collide, because there would be no ground, in fact or law, for the suggestion that the *Niobe* ought to be identified with any one of them.

So far as I can discover, none of the learned judges of the Court of Session indicated an opinion that the clause was so expressed as to cover every kind of liability for collision. They based their decision upon a special rule of law, which has admittedly no application except as between a ship and her tug. They held that the identity which that rule establishes between tow and tug is so complete, that the *Niobe* herself must be considered to have come into collision with the *Valetta* within the meaning of the policy.

A sailing vessel, and the steam-tug which has her in tow, have frequently been described by eminent judges as, for certain purposes, constituting "one ship," an expression which has been borrowed by text-writers, and is familiar to persons conversant with maritime law. The expression is figurative, and must not be strained beyond the meaning which the learned judges who have employed it intended that it should bear. As I understand their use of the expression, it signifies that the ship and her tug must be regarded as identical, in so far as the two vessels, with their connecting tackle, must be navigated as if they were one ship, and, the motive power being with the tug, must, in order to comply with the regulations for preventing collision at sea, be steered and manœuvred as if they formed a single steamship; and also, in so far as the ship towed, when she has (as in this case) the control of the tug, and the duty of directing the course of the tug in accordance with these regulations, is responsible for the natural consequences of the tug being wrongly steered, through the neglect of her officers or crew to perform that duty.

There was, therefore, a legal connection betwixt the *Niobe* and the *Flying Serpent* which could not subsist between her and any other vessel which her fault might drive into collision with a stranger ship. The *Niobe* was, in the contemplation of the law, one and the same ship with the *Flying Serpent* for all purposes of their joint navigation with a view to avoid the risk of collision; and the fault which led to a collision between that legal

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composite and the *Valetta* was admittedly the fault, not only of the *Flying Serpent*, but of the *Niobe*.

I admit the force of the appellant's argument that contracts ought to be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement. But there are exceptions to the rule. One of these is to be found in the case where the context affords an interpretation different from the ordinary meaning of the words; and another in the case where their conventional meaning is not the same with their legal sense. In the latter case, the meaning to be attributed to the words of the contract must depend upon the consideration whether, in making it, the parties had or had not the law in their contemplation.

The point thus raised appears to me to be a very narrow one. But, in this case, the contracting parties are shipowners and underwriters; and the clause in question relates to possible legal liabilities of the ship insured, which are entirely dependent upon the rules of maritime law. In these circumstances I have, not without some hesitation, come to the conclusion that they must be presumed to have known the law, and to have contracted on the faith of it.

Lord Bramwell:—

My Lords, in this case the facts are that the *Niobe* was insured by the respondents with the appellants and others, by a policy in the ordinary form, from the Clyde (in *tow*) to Cardiff, or Penarth, and thence to Singapore. In the margin of this policy is this, I believe, usual clause: "And it is further agreed that, if the ship hereby insured shall come into collision with any other ship or vessel, and the insured in consequence thereof become liable to pay, and shall pay, any money not exceeding the value of the ship hereby assured, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, or if the value hereby declared amounts to a larger sum than to such declared value."

What happened was this: The *Niobe*, in tow of a tug, pro-

ceeded on her voyage, and, by the negligence of the tug, and of those navigating the *Niobe*, the tug came into collision with the *Valetta*, and sank her. There was a collision between the *Niobe* and the *Valetta*, which may be disregarded, as it did no damage. In very fact, therefore, the ship has not come into collision with any other ship, and the insured paid something in consequence thereof. The insured, the respondents, have paid to the owners of the *Valetta* a large sum of money in consequence of the damage to her, owing to the conjoint bad seamanship of the tug and the *Niobe*, and this is sought to be recovered in this suit.

I say then, in very fact, the *Niobe* did not come into collision with the *Valetta*, causing a liability in the appellant, and, according to the ordinary primary meaning of the words used the case is not within them. This is agreed. But it is said that for some reason the primary and natural meaning of the words is to be extended; and that we should hold that there was a collision where there was none. I am at a loss to see why. I think an Act of Parliament, an agreement, or other authoritative document, ought never to be dealt with in this way, unless for a cause amounting to a necessity, or approaching to it. It is to be remembered that the authors of the document could always have put in the necessary words if they had thought fit. If they did not it was either because they thought of the matter and would not, or because they did not think of the matter. In neither case ought the Court to do it. In the first case, it would be to make a provision opposed to the intention of the framers of the document; in the other case, to make a provision not in the contemplation of those framers. Take this very case. Can any one say that, if the assured had required the insurers to agree to be liable for a collision by the tug (and be it remembered that it is mentioned the *Niobe* was to be towed to Cardiff), I say if such a requirement had been made, can any one say that the insurers would have agreed to it without an increase of premium: a liability for any towing till the voyage to Singapore was over? Suppose a suit to reform the document by making the insurers liable for collisions by the tug, could it have succeeded?

Let me examine the reasons given for adding to or altering

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the meaning of the words used. The Lord Ordinary says if the collision clause is read in the strictest manner he would be of opinion that the defender was not liable, but he thinks it admits of being read in a broader and more comprehensive sense. The superlative "strictest" is a difficult word to deal with. Is it to be read in a way not strict; if so, how far short of it? His Lordship gives his reasons; he says: "The risk they wished and had an interest to cover was liability arising from collision for which as owners of that particular ship, they might be liable." "That the defender knew they wished to cover it, and it may fairly be presumed that the clause was intended to cover that particular risk." I respectfully ask where is the evidence that they wished to cover any risk of collision beyond what they have expressed, or that the defender knew the pursuers so wished? I firmly believe that if the truth were known, neither party had it in mind; and I repeat, I am by no means sure it would have been included for the same premium. The Lord Justice Clerk says: "In certain circumstances the vessel is looked upon as being part of the tug, and the real question here is whether that view applies to such a case as this. I think it would have been far better if the policy had been more clearly expressed." With submission, that should be not "more clearly" but *differently* expressed. Nothing can be clearer than it is. It is said that to hold as I do is a "narrow construction." I respectfully deny it. I do not *construe* the words. I simply read them as I should "twice two are four." "*Narrow*"! Well, if too narrow is wrong so is too wide, which, to my mind, the construction, (for it is a construction), I object to, is. His Lordship came to the conclusion for the pursuer not without hesitation. Lord Young says the collision was just the sort of collision the possibility of which was contemplated by both sides. I should suppose, then, he does not agree with the Lord Justice Clerk, that it would have been far better if more clearly expressed. Lord Rutherfurd Clark doubts if the pursuer is right. Lord Lee agrees with the Lord Ordinary.

It is said that the *Niobe* was, in the contemplation of the law, one and the same ship with the *Flying Serpent* for all purposes of their joint navigation with a view to avoid the risk of collision.

I respectfully deny it. I deny that it is an intendment of the law. The law does not contemplate anything like it. A most distinguished lawyer, Lord Kingsdown, did once use the unfortunate metaphor, (judges ought to be very careful about using such expressions), that "the tug may for many purposes be considered as a part of the ship to which she is attached." He says "for many purposes," not all. He does not say that it is to be so considered that the plain words of a contract are to be misinterpreted. Had he foreseen what use would be made of his words he would not have used them. These two shall be one. And it is said that the parties to this suit knew all about this, and contracted on the footing of it.

Now, my Lords, this seems to me to be a case (too common) in which there is a tendency to depart from the natural primary meaning of words, and add to or take from them—to hold that constructively words mean something different from what they say. It introduces uncertainty. No case is desperate when plain words may be disregarded. I deprecate this in all cases. In this particular one I believe it will be attended with at least this injustice, that the parties did not contemplate the case that has occurred, and perhaps would have raised the premium if they had. That they did not contemplate it I infer from the words they used. Ingenious cases were put in which there might be damage by collision with the *Niobe* without her touching the vessel damaged, as where she pushed an intermediate vessel against that damaged. I have no doubt that ingenuity might suggest many difficult cases. I content myself with dealing with the present, where the ship did not in any sense come into collision with any other ship and cause damage. I think the judgment should be reversed, but I suppose I must be in the wrong, because four judges of the Court of Session have held differently, and three of your Lordships, I know, will hold differently.

Lord Morris:—

My Lords, in my opinion the contract must be construed as an insurance against risk or liability for payment by collision to be incurred by the *Niobe* while in tow. What the owners were

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bargaining for was indemnity against loss or payment which the *Niobe* might *incur* while being towed. I consider the tug part of the apparatus for moving the ship *Niobe*, and that a collision by the tug while so towing the *Niobe* was a collision of the *Niobe* within the meaning of the marginal clause of the policy; consequently that the judgment of the Court of Session should be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 27th July 1891.

Agents for appellant: *Waltons, Johnson & Bubb for J. & J. Ross, W.S., Edinburgh.*

Agents for respondents: *Lowless & Co. for Webster, Will & Ritchie, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

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CLARKE, Mrs. (Pauper) . . . . . Appellant;

and

THE CARFIN COAL COMPANY and Others . . . . . } Respondents.

Reparation—Parent and Child—Title to sue for Death of Illegitimate Child Employers' Liability Act (43 & 44 *Vict. c.* 42).

The parent of an illegitimate child has, by the law of Scotland, no right of action against a person whose negligence has caused its death.

Samson v. *Davie* (14 Court Sess. Cas. 4th Series (Rettie) 113) dissented from.

Appeal from a decision of the Second Division of the Court of Session, Scotland (1), which followed the similar case of *Weir* v. *Coltness Iron Company* (1), decided by the same Division, 16th March, 1889.

Mrs. Susan Clarke, the appellant, raised this action in the Sheriff Court of Lanarkshire, claiming from the Carfin Coal Company, the respondents, £500 damages in respect of her son's

(1) 16 Court Sess. Cas. 4th Series (Rettie) 614.

death through their default. She pleaded the Employers' Liability Act (43 & 44 Vict. c. 42). The son was fourteen years of age and illegitimate. At the time of his death he was earning 12*s.* a week, which went to support the appellant and her family. The respondents, who did not otherwise dispute the appellant's case, pleaded that she had no title to sue, her child being illegitimate. The sheriff-substitute, on the 5th of May, 1890, having heard the admission of the appellant that the deceased was illegitimate, sustained the respondents' plea, and assoilzied them from the conclusions of the action. This judgment was adhered to by the Second Division on the 31st of May, 1890. Their Lordships gave no opinion, as the point had previously been decided by them in *Weir* v. *Coltness Iron Company* (1), on the 16th of March, 1889.

Weir's Case (1) had also been brought up on appeal to this House.

The question was one of Scotch law, as in England the only claim that exists for loss through a relative's death by fault is limited to the cases provided for by Lord Campbell's Act (9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95).

On appeal,

July 2, 3. *Rhind* and *Baxter* (of the Scotch Bar) (with them *F. R. M'Ilraith*), for the appellant:—

The decision in *Samson* v. *Davie* (2) is sound. Lord Young, who dissented in that case, necessarily came to the consideration of *Weir* v. *Coltness Iron Company* (1), in which he delivered the principal judgment, with a somewhat prejudiced mind. The text writers on the law of Scotland are unanimous in holding that a bastard child is bound to support its indigent mother: Bankton, 1, 6, 18 and 20; Stair, 1, 5, 8 and 9; Erskine, 1, 6, 56; Hume's Lectures; Fraser on Parent and Child, 2nd ed. p. 127. See also the Roman Law Digest, xxv. 3, 5, sub-s. 4; Barclays, in his Digest, 4th ed. 25, says: "The mutual obligation of alimony exists between the mother and the bastard child." Lord Neaves

(1) 16 Court Sess. Cas. 4th Series (Rettie) 614.

(2) 14 Court Sess. Cas. 4th Series (Rettie) 113.

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said, in *Buie* v. *Stevens* (1), "An action of filiation is not an action of aliment. It is an action of debt between the parents, concluding that the defender shall relieve the pursuer in part of that support which she is bound to give to her child." This obligation is not limited to any period, but continues so long as the child is unable to support itself, although the incapacity should last during the whole of its life: *Finlayson* v. *Gown* (2); *Anderson* v. *Heritors* and *Kirk Session of Lauder* (3).

[LORD WATSON: Those cases refer to pupil children, and *Anderson's Case* was where the bastard child was never able to shift for itself, and therefore never emancipated.]

The test put by the Lord President Inglis, in *Eisten* v. *North British Railway Company* (4), was nearness of relationship, and there can be no doubt of the nearness of the relationship of the mother. In *Renton* v. *North British Railway Company* (5), Lord Jerviswoode decided that the mother of an illegitimate child had a title to maintain an action of damages for his death. All the decisions in the Sheriff's Courts from *Inspector of Forgue* v. *Duncan*, in 1851 (6), hold that a bastard is liable to support his mother.

J. J. Cook (of the Scotch Bar), for the respondents:—

Under the common law of Scotland the appellant has no right of action.

[EARL OF SELBORNE: Before Lord Campbell's Act no such action as this could be brought in England, and therefore English cases need not be referred to, as they depend on statutory law.]

While the common law of Scotland recognizes the right, in certain instances, of one person to recover damages in consequence of the death of another, that right is restrained within narrow limits. It applies to the cases of parents and children, husbands and wives, but it does not apply to the case of collaterals, even to those most closely related, brothers and

(1) 2 Court Sess. Cas. 3rd Series (Macpherson), at p. 223.
(2) July 7, 1809; 15 Fac. Coll. 400.
(3) March 11, 1848; 10 Court Sess. Cas. 2nd Series (Dunlop) 960.
(4) 8 Court Sess. Cas. 3rd Series (Macpherson) 980.
(5) 6 Scotch L. R. 255.
(6) 1 Sheriff Court, Dec. 194.

sisters: *Greenhorn* v. *Addie* (1); *Eisten* v. *North British Railway Company* (2). In the latter case, the Lord President Inglis based the right on two grounds—nearness of relationship between the claimant and the deceased, and the existence during life of a mutual obligation of support in case of necessity between them. Neither of these grounds is applicable in the case of an illegitimate child and either of his parents—not even the mother—for the relationship must be not merely natural, but lawful and legal relationship. The appellant seeks to put a bastard child in the position of a legitimate child; but the law, while not disputing the natural relationship between a bastard and his mother, draws a wide distinction between the different results of the relationship. The bastard child has no right of succession, and in the case of a bequest is treated as a stranger. Even as to the obligation of support from the parent, the rights are very different. In the case of a bastard, all the parent is bound to provide is relief from actual want; but, in the case of a lawful child, the amount of aliment depends on the station in life of the parties: *Foulis* v. *Fairbairn* (3). Further, in the case of a bastard child, the obligation to aliment is not mutual, and such a child is not bound to aliment its mother. The only case which decided the contrary was *Samson* v. *Davie* (4), and there the illegitimate son was sued for a pauper's allowance; and, assuming he was dead, she lost nothing. Therefore, that case, if good law, does not bear on such a claim as made here. But, in the opinion of Lord Young, that case cannot stand (5).

Rhind, in reply, cited *Wilson* v. *Todds* (6).

Reginald Brown, for the respondents in *Weir* v. *Coltness Iron*

(1) 17 Court Sess. Cas. 2nd Series (Dunlop) 860.

(2) 8 Court Sess. Cas. 3rd Series (Macpherson) 980.

(3) 14 Court Sess. Cas. 4th Series (Rettie) 1088.

(4) 14 Court Sess. Cas. 4th Series (Rettie) 113.

(5) 16 Court Sess. Cas. 4th Series (Rettie) 614. Lord Young stated in *Weir* v. *Coltness Iron Company* that *Samson* v. *Davie* had been brought up on appeal, and the parties settled the case on the footing that the judgment should be held as reversed with costs. An entry appears on the *Lords' Journals*, vol. cxix. p. 62, that such an appeal had been lodged, but there is no entry of any further proceedings.

(6) 3 Scotch L. R. 192.

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Company, asked that, should the opinion of the House be adverse to the respondents, judgment should be suspended until the appeal of Weir had been heard.

Judgment after consideration.

July 27. LORD WATSON:—

My Lords, this action was brought by the appellant before the Sheriff Court of Lanarkshire, for recovery of damages from the respondent company, upon the allegation that the death of her illegitimate son, a boy between fourteen and fifteen years of age, had been occasioned by their fault; and that she had in consequence suffered great sorrow and anguish, and had also been deprived of the assistance of her son in supporting herself and her family.

The sheriff-substitute assoilzied the respondents, upon the ground that, by the law of Scotland, an action of solatium and damages will not lie, at the instance of a natural mother, for the death of her bastard child; and his interlocutor was, on appeal, affirmed by the Second Division of the Court of Session. No opinions were delivered at the advising of the case, which their Lordships held to be directly ruled by the previous judgment of the same Division, in *Weir* v. *Coltness Iron Company, Limited* (1), which is practically the judgment submitted to review in this appeal.

In the Courts below, as well as at the Bar of the House, the appellant relied upon the existence of a continuing and reciprocal obligation between a natural mother and her illegitimate child to aliment each other when necessary, which was recently affirmed and given effect to by the Second Division in *Samson* v. *Davie* (2). In that case a bastard forty years of age, who had not seen his mother since he was of tender years, except on two occasions, when he did not know that she was his parent, was, at the instance of an inspector of poor, ordained to relieve the parochial board of the burden of her maintenance. Lord Young strongly dissented from the decision, the majority in favour of it

(1) 16 Court Sess. Cas. 4th Series (Rettie) 614.

(2) 14 Court Sess. Cas. 4th Series (Rettie) 113.

being the Lord Justice Clerk (Lord Moncreiff), the late Lord Craighill, and Lord Rutherfurd Clark.

Starting from that decision the appellant maintained that the law allows an action of solatium and damages to the parent of a legitimate child against the person whose negligence has caused its death, by reason of there having existed, between the pursuer and the deceased, in the first place, near relationship in blood, and, in the second place, a mutual obligation of support arising out of that relationship. It was conceded that there is no legal relationship between a bastard and its parent; but it was argued that, inasmuch as the law considers the natural tie which connects them to be so intimate as to give rise to a reciprocal duty of maintenance which it will enforce, they are within the principle which gives a right of action to persons legitimately connected in the same degree. On this point reference was made to *Eisten* v. *North British Railway Company* (1), where the Court dismissed an action by two sisters for reparation in respect of the death of a brother upon whom they were dependent; the main ground of the decision being that the law imposed no obligation of support upon their brother. The Lord President (Inglis) in that case (1) said: "It cannot be disputed that hitherto, in our law, no such derivative claim has been sustained, except when arising from the relation of husband and wife, or of parent and child; and, on the other hand, it is true that, in the law of Scotland, differing in that respect from some other systems of jurisprudence, a claim of this kind is sustained at the instance of a wife for the death of a husband, a husband for the death of his wife, a parent for the death of his child, and a child for the death of his parent, when the death has been caused by delict or culpa. And it is equally true that this claim may be maintained, although the party raising the action cannot qualify any direct pecuniary loss by the death of the relative. It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity. On these

(1) 8 Court Sess. Cas. 3rd Series (Macpherson) 980.

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two considerations in combination our law has held that persons standing in one of these relations to the deceased may sue an action like this for solatium, when he can qualify no real damage, and for pecuniary loss in addition, when such loss can be proved."

In *Weir* v. *Coltness Iron Company, Limited* (1), all the learned judges were of opinion that if the decision in *Samson* v. *Davie* (2), in which two of their number (Lords Young and Rutherfurd Clark) had taken part, were regarded as conclusive of the case before them, it would be necessary to hear further argument, and probably to consult the other judges. They did not find it necessary to adopt that course, and proceeded to dispose of the case upon the assumption that *Samson* v. *Davie* (2) was well decided. Shortly stated, their ground of decision was that such an action, at the instance of a natural parent, was unknown to the law; and that it was for the legislature, and not for the Court, to determine whether a remedy ought to be given to a person in the position of the pursuer.

I concur in the reasons assigned by the learned judges for their decision. As matter of fact, it cannot be disputed that, although for a century past actions for solatium and damages have been sustained at the instance of husband, wife, or legitimate child, in respect of the death of a spouse, a child, or a parent, a similar action at the instance of a natural parent or child had never (with one exception, which appears to me to be of no moment) been heard of in the law of Scotland. In my opinion, the rule which admits the former class of suits does not rest upon any definite principle, capable of extension to other cases which may seem to be analogous; but constitutes an arbitrary exception from the general law which excludes all such actions, founded in inveterate custom, and having no other ratio to support it. I venture to think that the Lord President in *Eisten* v. *North British Railway Company* (3) did not mean to suggest that the rule (or rather the exception) was capable of being extended to cases other than those in which it had already been received. To my mind, it is evident that by "nearness of relationship" his

(1) 16 Court Sess. Cas. 4th Series (Rettie) 614.

(2) 14 Court Sess. Cas. 4th Series (Rettie) 113.

(3) 8 Court Sess. Cas. 3rd Series (Macpherson) 980.

lordship meant legal relationship; because he treats as an essential element of the pursuer's claim the right to demand solatium, which is a right to reparation for disruption of the family tie, and therefore impossible in the case of natural parent and child; and also because his lordship subsequently describes the connection between a bastard and his putative father as "one which the law cannot recognise."

The solitary exception to which I have referred is the judgment of a Lord Ordinary (Jerviswoode) in 1867 (1), sustaining the competency of an action of this kind by a bastard's mother. The case has not been traced farther, and it does not, in my opinion, constitute a precedent of any value. In his note, as reported, the learned judge is represented as having said that on the merits of the case he did not entertain any serious doubt. The rest of the note does not suggest that any of the real difficulties which beset the question had been brought before his Lordship, who presumably gave judgment on the footing that there was no mutual obligation of support between the pursuer and the deceased. That such mutuality exists was admittedly not decided by the Court of Session until 1886, in *Samson* v. *Davie* (2), which appears to have led to *Weir* v. *Coltness Iron Company, Limited* (3), and the present case.

Although I have, for the reasons already stated, come to the conclusion that the decision of the Court below is right in law, I understand some of your Lordships to be of opinion that these reasons afford a narrow, if not an insufficient, ground for affirming the interlocutors under appeal. I have, in these circumstances, thought it right, with the aid of the arguments and of the authorities which were submitted to us, to examine the judgment of the Court of Session in *Samson* v. *Davie* (2), which has not been brought under appeal. If that decision be not accepted as a correct exposition of the law, the case of the appellant, upon her own argument, must necessarily fail.

By the law of Scotland there are certain disabilities attached to the condition of bastardy, as to which there can be no room

(1) 6 Scotch L. R. 255.
(2) 14 Court Sess. Cas. 4th Series (Rettie) 113.
(3) 16 Court Sess. Cas. 4th Series (Rettie) 614.

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for dispute. To borrow language used by the Scottish Bench in the year 1692, bastards are regarded as "unlawful productions" which "are not to be encouraged" (vide *Ker* v. *Tutors of Moriston* (1)). Unless legitimated by the subsequent marriage of his parents, the bastard has no place in the family of either. In intestacy, he has no right of succession to them in heritage or in moveables, and he cannot inherit from any one through them. Should his parents bequeath property to him, he must pay the highest rate of succession or legacy duty, as the case may be, not because the legislature has so prescribed, but because he is in the eye of the common law a stranger to them in blood.

It humbly appears to me that to impose upon illegitimate children, to whom the law denies the status of blood-relationship and all rights of succession, a liability to maintain parents who, in the most charitable view, have done them a great wrong, would be harsh and inequitable; and I am of opinion that no such rule ought to be enforced unless it is shewn to have been firmly established in the law of Scotland. It was, no doubt, held to be established in *Samson* v. *Davie* (2); but it is not without significance that Lord Moncreiff, one of the majority, said in giving judgment: "It is true there is a paucity of authority. But there are some cases and dicta" (3). An examination of the books has satisfied me that the dearth of authorities, tending to support the rule, is even greater than the language of the noble and learned lord would seem to indicate.

Before adverting to the authorities there are two expressions upon which I desire to remark, which have been frequently used by Scotch judges in bastardy cases and by text-writers, one of which appears to me to have been sometimes employed in a way calculated to mislead. It has often been laid down that a bastard is filius nullius. Of that expression it is sufficient to say, that it is as true in a legal as it is untrue in a natural sense. Again, it has been said that a bastard has a mother but no father. The phrase is unobjectionable so long as it only meant to express the obvious fact that the maternity of a bastard is, comparatively

(1) Mor. Dict. 1363.
(2) 14 Court Sess. Cas. 4th Series (Rettie) 113.
(3) 14 Court Sess. Cas. 4th Series (Rettie) at p. 120.

speaking, a matter of certainty, whereas its paternity may be matter of doubt, and, in some cases, the father may never be identified. It becomes, in my opinion, mischievous when it is used to convey the suggestion that, after the father has been ascertained, by admission, or by judicial proof, the natural tie which connects him with the child is more slender and less enduring than that which binds the child to its mother. There is no principle of natural law which can justify such a distinction; and, beyond a few loose dicta, I can find no authority for it in the law of Scotland.

Lord Stair, whose Institutions were first published in 1693, treats (I. V. 8 and 9) of the duty of legitimate children to relieve the wants of their necessitous parents according to their ability—a duty which he traces to the law of nature, and to a remuneratory obligation on the child, corresponding to the parental duty of educating and maintaining it, not only during its continuance in the family, but after emancipation. In a subsequent part of his work the learned author (III., III. 43, et seq.) explains the incapacity of bastards to succeed to the estate of their progenitors; but he nowhere deals with the alimentary rights or liabilities depending upon their natural relation to their parents.

Bankton, who wrote about the middle of the eighteenth century, after stating the law with respect to legitimates, proceeds to say (1, 6, 18): "Natural children or bastards, even those which are the issue of adulterous or incestuous embraces, are entitled to aliment from their parents; according to the Canon Law, and the dictates of nature, *it is equally incumbent on both, if they are able; and if the one is not, the other must undergo the whole, till they are capable to do for themselves, or to earn their bread.*" In a subsequent paragraph (1, 6, 20) he lays down the doctrine that, in case of necessity, the parents must depend upon the children, and that the children are naturally bound to maintain them. It was argued for the appellant that the learned author meant to include in that rule illegitimate as well as legitimate children—an interpretation which I am unable to accept for two reasons. In the first place, the rule evidently relates back to the obligation previously stated by him to be incumbent upon married parents, to support their issue, not only during the minority but

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during "other incapacity of the persons to support themselves" (1, 6, 15, ad. fin.), and merely introduces a reciprocal obligation on the part of the children. In the second place, I can hardly suppose that the writer meant to lay a reciprocal obligation upon children who, according to his previous statement, were only entitled to parental support until they were able to "do for themselves."

Erskine, whose Institute is about thirty years later than Bankton's treatise, lays down the law in terms which appear to me to assume that the obligation of natural parents does not endure beyond the period during which the child is, from its youth, unable to support itself. He says (1, 6, 56): "It does not seem fixed in general how long parents are bound to maintain their natural children. In the case of a gentleman, the obligation was found to continue till the child was fourteen years of age: Paterson (1)." These words obviously refer to the length of time for which the parents are bound to educate and aliment their child, in pupillarity or minority, and have no reference to the case of a bastard who, having attained majority and become self-supporting, is reduced to indigence.

The next authority is a passage from the MSS. lectures of Baron Hume, Professor of Scots Law in the University of Edinburgh, during the present century. I think it right to refer to that passage, because it was relied on by one at least of the majority in *Samson* v. *Davie* (2). It has been preserved by the late Lord Fraser in his treatise upon Parent and Child (ed. 1866, p. 127), and is in these terms: "There is no obligation on a natural child to aliment his reputed father; at least, it is an extremely doubtful question. The contrary holds with respect to the mother, however, whom her child is always bound to support, if she be in indigent circumstances." Where Baron Hume, who was a very able lawyer, found that doctrine does not appear, because he cites no authority in support of it. But it is clear that all the authorities, if any, upon which it could be based, are as accessible to the profession now as they were to the learned lecturer.

I now come to the decisions of the Court of Session, which, if

(1) Mor. Dict. 11080. (2) 14 Court Sess. Cas. 4th Series (Rettie) 113.

not the only, are at least the most reliable source from which the true state of the law can be ascertained. The printed decisions range over a period of nearly 200 years, beginning with the case of *Ker* v. *Tutors of Moriston* (1) (already cited) in 1692, and ending with *Samson* v. *Davie* (2) in 1886. It is unnecessary to refer to them in detail, because the sum and substance of what they do decide can be stated within a narrow compass.

First of all, they settle, in conformity with the text of Bankton and Erskine, that there is a joint obligation upon both parents to maintain their natural child until it becomes capable of earning its own livelihood; and that the inability of either parent casts the whole liability on the other. The duty of maintenance to that extent is, in my opinion, one which the parents owe as much to the community of which they are members as to the child whom they have irregularly brought into the world. The bulk of these cases involve nothing more than the conflicting claims of the father and mother to the custody of their pupil bastard—a controversy which throws no light upon the question which your Lordships have to decide.

As a necessary consequence of the rule that support must be given by the parents until the child is able to provide for itself, it has been repeatedly held that the parental obligation continues, even after majority, in cases where, owing to mental or physical infirmity, the child remains incapable of gaining its own subsistence. In pursuance of that principle, the Scotch Poor Law Act (8 & 9 Vict. c. 83, s. 80), has made desertion, or neglect to maintain their unemancipated child, an offence punishable by fine or imprisonment, in the case of a natural mother or putative father, as in the case of married parents.

In *Anderson* v. *Heritors and Kirk Session of Lauder* (3) the Lord Ordinary (Cuninghame) said in his note: "The only ground upon which it occurred that a plea might be stated for the defender (the putative father) was, as to his legal obligation, ex intervallo, to afford aliment to an illegitimate daughter, which, under the circumstances, seems a novel claim. She must once

(1) Mor. Dict. 1363.
(2) 14 Court Sess. Cas. 4th Series (Rettie) 113.
(3) 10 Court Sess. Cas. 2nd Series (Dunlop) 960.

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have been working for herself for a series of years; and as in law she never would have been bound to aliment the father if he had come to poverty, it might be questioned if he was now bound to aliment her. But, as no plea is raised on this ground, it is probably felt to be untenable. It was further stated, that the daughter never had been able to work for her bread, from some bodily maladies; if so, the case is the same as if a party begat a child born insane, or with incurable disease. In that case, the obligation of the father, if solvent, to maintain the child till her death could hardly be disputed." The case came, by advocation, from the Sheriff Court, where, apparently, the inquiry had been confined to the fact of the defender's paternity; and, in the Court of Session, it does not appear to have been disputed by the defender that the child had never been able to earn its livelihood. The opinion of the learned judge, which is somewhat speculative, goes no further than this, that a claim against a putative father for the maintenance of his child becoming indigent, after it had been self-supporting, was, in the year 1848, an entire novelty; and that, if the liability did exist, it gave rise to no corresponding obligation on the part of the child.

In *Corrie* v. *Adair* (1), which was an action by the mother against the father for recovery of aliment for their bastard child, the Lord President, Inglis (then Lord Justice Clerk), stated that there is no obligation on a bastard to maintain its putative father. His Lordship said (2): "The bastard having no father, what is the relation of the man by whom paternity has been admitted or against whom it has been proved? It is not a relation which creates reciprocal duties and obligations. The father has no right of custody of the bastard's person, or of administration of his estate; he has none of the characteristics of the patria potestas. The only relation is that the father is to a certain extent, and under certain conditions, liable to aliment the child. But, even in the matter of aliment, the relation between a bastard child and his father is different from that between a legitimate child and his father. In the latter case the obligations are reciprocal; but they are not so in the former.

(1) 22 Court Sess. Cas. 2nd Series (Dunlop) 897.

(2) 22 Court Sess. Cas. 2nd Series (Dunlop), at p. 900.

The only vestige of connection is the obligation on the part of the father under certain conditions to provide or contribute to the maintenance of the child while unable to support itself."

In the subsequent case of *Reid* v. *Moir* (1), an observation was made by Lord Cowan in regard to the different character of the relations between a bastard and its male and female parents respectively. There was no question of bastardy raised in the case, which was an action by an inspector of poor against a husband for aliment supplied by the parish to the indigent parents of his wife. Lord Cowan said: "Your Lordship has referred to the case of a bastard child. I am not prepared to give any decided opinion upon that case, which is a peculiar one, and, as I view this case, it is not necessary for its decision. At the same time, I see no reason to doubt that the same principle is applicable to both cases. What I hesitate about is this: I do not think there is the same reciprocity of obligation between a bastard child and its putative father as there is between a legitimate child and its legitimate father. *There may be an obligation on the part of a bastard child to aliment its mother*; but I do not know of any authority for holding that the same applies to the putative father."

To return to the decisions, there is no case in which a parent (whether father or mother), who had launched a bastard into the world after educating and fitting the child to support itself, has been held liable, upon the child subsequently becoming indigent, to relieve its necessities. And there is not a single case before *Samson* v. *Davie* (2) in which it was held, and (excepting Lord Cowan's dictum in *Reid* v. *Moir* (1)) none in which it has been suggested, that a bastard is under any obligation to support either one or other of his parents when they fall into poverty.

I have now noticed in detail all the authorities which were before the Court in *Samson* v. *Davie* (2), so far as these consisted of the law expounded by institutional writers, decisions, or judicial dicta, and I have also briefly indicated the points which, down to 1868, had and had not been established by

(1) 4 Court Sess. Cas. 3rd Series (Macpherson) 1060.

(2) 14 Court Sess. Cas. 4th Series (Rettie) 113.

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judicial decision. None of these authorities support the doctrine affirmed in *Samson* v. *Davie* (1), with the exception of one passage in the lectures of Baron Hume, and one obiter dictum of the late Lord Cowan. I think it unfortunate that Lord Cowan, after stating that he was not prepared to express, and that it was unnecessary to express, any opinion upon the case of a bastard child, should nevertheless have proceeded to use language which has been represented as a deliberate statement of his Lordship's opinion. I venture to doubt whether the learned judge intended his words to be so construed.

In *Samson* v. *Davie* (1) Lord Cowan's dictum was much relied on by Lord Craighill, who thus endeavoured to explain the difference which it suggests between the relation of a bastard to its mother and the relation of a bastard to its putative father: "In the eye of the law, the woman bearing the child and the child to which she gives birth are mother and son; whereas the child that is born and the man who is made liable for a contribution of aliment, the putative father, are in no way related." That statement appears to me to be absolutely incorrect if the relation of the bastard to each of its parents be tested by the same legal standard. It does correctly set forth the relation between child and mother according to the law of nature, and also the relation between child and father according to the common law. It ignores the fact that, at common law, the mother is, as much as the father, an utter stranger in blood to her child; and that, by natural law, the father is as nearly related to the child as its mother. Reason and authority are both against the existence of any liability on the part of the bastard to support its father in his indigence, and I have been unable to discover any considerations which render the bastard's natural tie to its mother such as to raise a reciprocal obligation of support.

Some of the learned judges in *Samson* v. *Davie* (1) seem to have regarded as authoritative passages in the Digest which undoubtedly bear that a mother and her bastard child, or vulgo quæsitus, are reciprocally bound to support each other. Lord Moncreiff observed that "texts of the civil law are not indeed

(1) 14 Court Sess. Cas. 4th Series (Rettie) 113.

authorities, but illustrations, and very important illustrations." I agree with Lord Young in thinking that the rules of the civil law in the age of Justinian furnish a very unsafe guide to the law of Scotland touching the personal relations of parents and their children, whether legitimate or illegitimate. The two systems of jurisprudence differ widely in regard to the relations between parent and child and the principles upon which these ought to rest; and I am not prepared to accept, in cases like this, any canon of the Roman law which is not clearly shewn to have been adopted as part of the law of Scotland.

The appellant relied upon seven decisions by the sheriff or his substitute, in five different counties, between 1851 and 1858, finding an adult self-supporting bastard liable in aliment to the natural mother. These were submitted to the judges in *Samson* v. *Davie* (1), but were not noticed by them, obviously because decisions of the inferior courts do not constitute the law. It might be otherwise if, upon the faith of them, rights had been created which it would be inexpedient to disturb. But it is idle to suggest that any Scotch bastard has been begotten and born since 1851 in reliance upon his future liability to support his mother.

Being of opinion that there is not in the law of Scotland sufficient trustworthy authority to support the judgment in *Samson* v. *Davie* (1), I think the interlocutors appealed from must be affirmed and the appeal dismissed, and I move accordingly.

EARL OF SELBORNE :—

My Lords, I concur in the motion which my noble and learned friend Lord Watson has made.

Apart from the decision of the Second Division in *Samson* v. *Davie* (1), there is an entire absence of authority in the appellants' favour: for I cannot regard one recent judgment of a Lord Ordinary, in a case which (so far as appears) never went further, as of any weight as authority. The general rule of the law of Scotland (as of England) with a view, no doubt, to the encouragement of marriage and the discouragement of illicit connections, is, not to recognise the natural relationship between a

(1) 14 Court Sess. Cas. 4th Series (Rettie) 113.

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bastard and his natural parents, or either of them, for the purpose of those civil effects and consequences which result from the relation of a legitimate child to his parents. The bastard can take nothing from either of his natural parents by succession or by bequest, otherwise than as a stranger in blood; and it seems to be now admitted, even by those who have considered the bastard to be liable in law to maintain his mother, that he is not liable to maintain his putative father; though ascertained to the effect of making the putative father liable for the bastard's maintenance until able to maintain himself. It is not inconsistent with this general state of the law, that both the natural parents should be liable, while the bastard is in pupilage and until he is able to maintain himself, to maintain the offspring which they have brought into existence; and it seems to me to be false reasoning, to infer from this a reciprocal obligation upon the bastard, after his state of pupilage and of incapacity to maintain himself has ceased.

The whole argument for the appellant depends upon the decision in *Samson* v. *Davie* (1). If both cases can stand together, that decision is no sufficient foundation for the argument. I must admit that such a state of law does appear to me to be arbitrary; for, if principle ought to be regarded, I should not find it easy to say that the bastard is to be recognised as a child for the purpose of imposing upon him an obligation to maintain his mother, but that he is not to be so recognised when the mother seeks a solatium for his death in circumstances which would have given her a right of action, if he had been legitimate. But, if principle is to be regarded, a state of law which imposes upon an emancipated bastard child the burden of maintaining his mother because he is her child, while it does not allow him to take from her by succession, or except as a stranger in blood by bequest, seems to me also to be arbitrary; and, in that view the present decision is more, and that in *Samson* v. *Davie* (1) less, consistent with principle. If the two decisions cannot stand together, I prefer the present, as the more consistent with principle, and with the state of previous authority bearing upon the immediate question. As to the authorities on which *Samson*

(1) 14 Court Sess. Cas. 4th Series (Rettie) 113.

v. *Davie* (1) was decided, I agree with the observations of my noble and learned friend Lord Watson, and do not think it necessary to add anything further. Quocunque modo, the interlocutors appealed from are right, in my judgment, and ought to be affirmed.

LORDS MACNAGHTEN and MORRIS concurred.

Interlocutors appealed from affirmed; and appeal dismissed.

Lords' Journals 27th July 1891.

Agent for appellant: *Andrew Beveridge, for Wm. Officer, S.S.C., Edinburgh, and J. Shaugnessy, Writer, Glasgow.*

Agents for Respondents: *Deacon, Gibson & Medcalf, for Simpson & Marwick, W.S., Edinburgh.*

(1) 14 Court Sess. Cas. 4th Series (Rettie) 113.

[PRIVY COUNCIL.]

J. C.*
1891
July 4.

MARSHALL'S PATENT.

Prolongation of Patent—Practice—Time for filing Petition.

Where a petition for prolongation has not been presented within six months before the patent, which had been granted in 1877, had expired:—

Held, that it is excluded both by 5 & 6 Wm. 4, c. 83, and also by 2 & 3 Vict. c. 67.

Brandon's Patent (9 App. Cas. 589) and *Jablochkoff's Patent* (ante, p. 293), distinguished.

THIS was a petition by the assignee of Marshall's Patent, dated 27th of June, 1877, and sealed the 7th of December, 1877, for leave to present his petition for prolongation which had been presented on the 27th of June, 1891, and rejected on the ground that it was too late. The lateness of the presentation was now explained by an affidavit stating the circumstances to which it was attributable. The invention was of improvements in the manufacture of gas and of an apparatus therefor.

Cooper Willis, Q.C., and *Agabeg*, for the petitioners.

Sutton, for the Crown.

[Reference was made to *Brandon's Patent* (1); *Bodmer's Patent* (2).]

The judgment of their Lordships was delivered by

LORD WATSON:—

The petitioner in this case referred to and relied on the judgment of this Board in the case of *Brandon's Patent* (1) as an authority in his favour to this extent that his patent is not within the provisions of the recent Act of 1883, and that he has the right to apply for a renewal which is conferred upon patentees by older

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

(1) 9 App. Cas. 589.

(2) 2 Moore P. C. 471.

legislation. In no other respect is this case on all fours with *Brandon's Case* (1); it differs from that case and the case of *Jablochkoff's Patent* (2) in this respect that in those cases the patentee was in a position to prosecute his application with effect before the patent expired. That result in the circumstances of the present case is plainly impossible, because the petition was presented to the registrar on the very day on which the patent came to its natural end. There are only two statutes to which the petitioner can refer in support of his claim to have his patent renewed after its expiry, viz., 5 & 6 Wm. 4, c. 83, and 2 & 3 Vict. c. 67. It is perfectly plain that his application is excluded by the provisions of both those statutes. The first of them deprives this Board of any jurisdiction to prolong a patent under such circumstances; the second relaxes that rule and enables the Board to recommend the extension of a patent after its expiry in certain cases; but in all these cases it is made an essential condition that the patentee, presumably for the information of the public, shall have presented his petition six months before its expiry. Not having complied with that condition, it is plain that the petitioner cannot get the benefit of the relaxation given by the later Act. The petition must therefore stand dismissed.

Solicitors for the petitioner: *Hulbert & Crowe.*
Solicitors for the Crown: *The Treasury.*

(1) 9 App. Cas. 589. (2) Ante, p. 293.

J. C.*
1891
July 9.

[PRIVY COUNCIL.]

SOUTHBY'S PATENT.

Prolongation of Patent—Non-user of Invention—Presumption of Non-utility rebutted.

Where an invention has not been brought into use during the term of the letters patent, but such non-user is satisfactorily accounted for, and the invention is one of great merit, an extension may be granted.

THIS was a petition for prolongation of letters patent dated the 8th of August, 1877, and granting to Southby and his representatives the sole privilege to make, use, and exercise, and vend his invention (an ice-making apparatus) within the United Kingdom for fourteen years. The invention related to a method and apparatus for cooling and freezing water, and for cooling liquids containing water. It consisted in preventing such condensation of vapour as would stop refrigeration of the liquid, by maintaining every part of the pumps and passage in contact with the vapour at such a temperature as to prevent its condensation, whereby the vapour, notwithstanding its extreme tenuity, passes through the pumps just as if it were a permanent gas.

The petition stated that experimental machines had been made under the letters patent, but that great difficulties had been experienced and expense incurred, and that it was only at the present time that a reasonable expectation had arisen of obtaining any compensation for the expenditure of time and money which had been incurred, and that the petitioners believed that they would very shortly be in a position to supply the said patented apparatus to the public, and to grant licences for its use.

Moulton, Q.C., and *Goodeve*, for the petitioners.

Sir *R. Webster, A.-G.*, and *Sutton*, for the Crown.

* *Present*:—Lord Macnaghten, Lord Hobhouse, Lord Hannen, and Sir Richard Couch.

[The cases cited were *Allan's Patent* (1); *Herbert's Patent* (2).]

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

Their Lordships are disposed to agree that the invention which has been placed before them is one of absolute originality and a high degree of merit, because it appears to render it possible, for the first time, that the vapour which water is made to give off for the purpose of bringing on the process of freezing should be withdrawn by mechanical instead of chemical methods which have always been used previously and are still used, and the great advantage to the public of applying the mechanical method will be that all danger of explosion is thereby entirely removed. There may be other advantages in cheapening the process, but that is rather a speculative matter which it is impossible to decide, owing to the peculiar circumstances of the case, but their Lordships rest their opinion as to utility on that which is not disputed, that a machine will be created which will not be liable to explode. The patentee has for fourteen years or more devoted very nearly if not quite the whole of his time to the perfection of this original idea of his. It seems that from time to time as he made improvements, fresh mechanical difficulties which he had not foreseen developed themselves, and that he applied his industry and ingenuity to overcoming those difficulties one after another. In that he or Mr. Blyth, who is associated with him, has incurred a very large expense, and considering the time, the ability, and the expense devoted to bringing into practical action an idea of great merit, their Lordships think that that merit is enhanced.

Then there comes the fact that the machine has never been used. No doubt as a rule the non-user of an invention is proof or strong presumption of non-utility. But that depends upon the opportunities which the trade have had of making use of the machines, and where those opportunities have been very rare, as in the case of some inventions only usable for large machines or in very peculiar operations, the presumption of non-utility from

(1) Law Rep. 1 P. C. 512. (2) Law Rep. 1 P. C. 399.

J. C. 1891 *In re* SOUTHBY'S PATENT.

non-user is small. In this case, which, as far as their Lordships know, is unique in that respect, the non-user has arisen from the conviction of the patentee himself that he has not brought his principle into such practical action as would justify him in offering a machine to the public or to the trade. Their Lordships think under the circumstances that non-user is accounted for so as to rebut the presumption of non-utility which arises from it. Their Lordships have not forgotten that in 1885 a very important invention was made by the patentee which is apparently essential to working his machine, and as long as that patent lasts, which will be till the year 1899, he will have the protection of that patent. But it is said that there may be other ways of overcoming the great difficulty in the way of this invention, the difficulty of starting the machine, which precluded its practical action for a long time. But their Lordships are of opinion that the patentee ought to have the advantages of his original invention secured to him, and that he ought not to be left only to the protection of the patent of 1885, but should enjoy an extension of the patent of 1877 free from all attempts to overcome the difficulty of starting by other means than those provided in the patent of 1885.

Their Lordships will on these grounds recommend to Her Majesty that there should be an extension of the patent for five years.

Solicitors for the petitioners: *Wilkins, Blyth, Dutton, & Hartley.*

Solicitors for the Crown: *The Treasury.*

[PRIVY COUNCIL.]

DONNELLY AND OTHERS . . . . . DEFENDANTS; J. C.*
1891
AND
BROUGHTON . . . . . PLAINTIFF. *May* 1, 6; *July* 4.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND (DISTRICT OF WELLINGTON).

Law of New Zealand—Wills of Maoris—Probate—Onus Probandi.

Held, that strict proof must be given of a will which is informal, signed by mark instead of the usual subscription in full of the testator, and has been obtained from him by one of the propounders having a substantial interest in its provisions and witnessed by two of her relations. Such a will is not invalid; but the onus probandi may be increased by circumstances, and the presumption may even be conclusive against the validity of the instrument.

The rules which govern Courts of Probate must not be relaxed in the case of alleged testamentary papers executed by Maoris on their death-beds.

APPEAL from a decree of the Court of Appeal (Nov. 26, 1888), reversing so much of a decree of the Probate Judge (Aug. 6, 1888), as declared that a will propounded by the appellants was duly executed by the testator on the 12th of April, 1888, and granting probate to the respondent of a will dated the 12th of January, 1887.

The testator above referred to was Renata Kawepo, an aboriginal native chief, who resided at Omahu, and died there on the 14th of April, 1888.

The facts are stated in the judgment of their Lordships.

Rigby, Q.C., and *Costelloe*, for the appellants.

Crackanthorpe, Q.C., *Strickland*, and *Ollivier* (of the New Zealand Bar), for the respondent.

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

J. C. 1891 DONNELLY v. BROUGHTON.

The judgment of their Lordships was delivered by

LORD WATSON:—

This is a competition for the right of succession to the estates, real and personal, of Renata Kawepo, a Maori chief, who resided at Omahu, in the district of Hawkes Bay and Colony of New Zealand, and died there childless, at an advanced age, on the 14th of April, 1888. His principal wife predeceased him; but he was survived by two spouses of inferior rank, whose precise legal status has not been explained.

The appellants, defendants in the original suit, are Mrs. Airini Donnelly, who is of pure Maori blood, her infant daughter Maud Donnelly, her two Maori brothers and their infant children, and her two sisters. Mrs. Donnelly is the grandniece of the deceased, by descent from his sister-uterine; and, according to native custom, is the legal successor to his property and tribal position. She was brought up by him in a manner befitting her rank, and had the management of his household until the year 1878, when she was married to her present husband, George Prior Donnelly. Her intermarriage with a foreigner gave great offence to the old chief, and led to an estrangement, which was aggravated by Mrs. Donnelly appearing in the Land Court as a rival claimant of unsettled territory which Renata was desirous of having adjudged to himself. In the beginning of the year 1888 Mrs. Donnelly consented to withdraw her opposition to her grand-uncle's claim; and, in consequence of that concession, a reconciliation took place about a month before his death.

The respondent, William Muhunga Broughton, plaintiff in the Court below, is a distant relation of the deceased, being the half-caste son of Te Oiroa, the great grand-daughter of the sister of Renata's maternal great grandfather. After the marriage of Mrs. Donnelly he lived with the chief until his decease, and took an active part in the management of his property and affairs.

The respondent, on the 24th of April, 1888, filed a summons in the Supreme Court of New Zealand, in order to obtain probate of a will executed by Renata on the 12th of January, 1887. By the terms of that instrument the deceased appointed the respon-

dent to be his sole executor, and declared that all his property, real and personal, should absolutely belong to the respondent, subject always to the trusts and directions therein expressed. One of these is a direction to realize and invest a sum of money sufficient to yield a clear annual income of £450 sterling, to be held by the respondent in trust, as regarded three ninth parts, for payment of annuities of £100 and £50 respectively to the testator's two wives; and as regarded the remaining six ninth parts, for behoof of three of the testator's relatives in life-rent, and their lawful issue in fee. Another direction is that the executor shall "well, carefully, and faithfully see to the welfare and well-being of my hapus and people, and reserve such of my lands for their use and occupation, and make such provision therefor as to him shall see fit." The instrument was prepared by a solicitor, with the assistance of counsel, and was signed and duly executed by the deceased, who thereafter formally acknowledged it to be his last will before a justice of the peace.

The application for probate was resisted by the appellants, who, by their counter-claim, propounded, as the last will and testament of the deceased, a writing bearing date the 12th of April, 1888, in these terms: "The persons for my will are Airini and her younger brothers and sisters and their children." At the foot of the document is the signature "Renata + Kawepo," with a cross or mark between the two words; and there are also the signatures of two persons as attesting witnesses, one of them being Te Teira, an uncle of Mrs. Donnelly, and the other Te Roera, who is related to Te Teira, but in what degree does not appear. It is not matter of dispute that the body of the document and also the words of the signature, "Renata Kawepo," are in the handwriting of Mrs. Donnelly. The appellants allege, but the respondent does not admit, that the interjected cross or mark was made by the deceased.

The appellants do not dispute the genuineness of the will propounded by the respondent, their case being that it has been revoked by the latter will in their favour.

Both Courts below were of opinion that the terms of the second will, if it was duly executed by the deceased, are sufficient to carry to Mrs. Donnelly and the other persons therein named the

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whole estate of the deceased, whether real or personal, which was bequeathed to the respondent by the will of 1887. But the main question submitted for decision was—whether the writing of the 12th of April, 1888, was duly executed by the late Renata Kawepo as his last will and settlement.

The cause was tried before Sir James Prendergast, C.J., without a jury, when a great mass of testimony was adduced on both sides. The bulk of it has little or no bearing upon the real issue; but, in so far as it is relevant, the evidence led by the parties is on all material points in direct conflict.

The learned Chief Justice pronounced in favour of the second will, and in delivering judgment observed that, had it not been for the testimony of one witness for the appellants, he would "have found much difficulty in arriving at a conclusion that Renata had executed the will propounded by Mrs. Donnelly." In coming to the conclusion at which he did arrive, the learned Judge relied upon the evidence given by the witness Archdeacon Williams, as to expressions used by the deceased in the course of Friday, the 13th of April, the day before his death, indicating an understanding and belief on his part that he had already made a last will in favour of Mrs. Donnelly.

On appeal, the decision of the Chief Justice was unanimously reversed by a Court consisting of four puisne Judges, whose opinion was delivered by Richmond, J. They agreed with the Chief Justice in thinking that, if the evidence of Archdeacon Williams were not taken into account, it would be impossible to hold that the appellants had proved the will. But they differed from his conclusion because, in the first place, they adopted a stricter view of the burden of proof incumbent upon parties who seek to set up an informal will, signed by mark instead of the usual subscription in full of the testator, obtained from him by one of their own number having a substantial interest in its provisions, and witnessed by two of her relatives; and, in the second place, they held that the evidence of the one witness upon whom he relied was not conclusive, or at all events was insufficient per se to satisfy the onus attaching to the appellants.

Their Lordships do not think it would serve any useful purpose to examine the evidence in detail. It is, however, necessary

to refer to the surrounding circumstances, and to the relations in which the parties stood to each other and to the deceased, at the time when the will is said to have been executed by him. As to these facts, there is really no material variance in the accounts given by the witnesses on either side.

During the week commencing on the 8th of April, 1888, there was a large congress of Maori chiefs held at Omahu. Mrs. Donnelly, whose residence, Crissoge, is a mile and a half distant from Omahu, was requested by Renata to direct, or to aid in directing, his preparations for their hospitable reception; and, for ten days before Renata's death, the lady seems to have spent a considerable part of each day at Omahu. On Friday, the 6th of April, Mrs. Donnelly became seriously alarmed about the state of Renata's health, and sent for Dr. Spencer, who came the following day, and (with the exception of the Sunday) continued to see his patient daily until Friday, the 13th. On the Monday Dr. Spencer communicated to Mrs. Donnelly his apprehension that Renata would not recover, and recommended that, if he had any business affairs to settle, he should be advised to do so at once. On the Wednesday another medical man, Dr. Faulknor, was called in by the respondent, and the result of a consultation was that the doctors differed, Dr. Faulknor taking a favourable view of the patient's symptoms, which ultimately proved to be over sanguine. After Dr. Faulknor left, Dr. Spencer had a conversation with Mrs. Donnelly and the respondent, when he repeated his opinion that, if Renata had any business affairs to settle, he ought to be informed that there was no time to lose. The respondent, on that occasion, made no objection to Renata's being told what Dr. Spencer advised. On the same day, Dr. Spencer, who knew nothing about Renata's having previously executed a settlement, and who in the course of his professional avocations appears, naturally enough, to have been occasionally required to prepare a patient's will, had "offered Mrs. Donnelly to make the will if wanted."

The infirmity of Renata, and the propriety of his making a testamentary settlement of his affairs, became, after the opinion of Dr. Spencer was expressed to Mrs. Donnelly on Monday, the 9th of April, a common theme of conversation and discussion, not only in the household of the deceased, but among the Maori

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chiefs then assembled at Omahu. Mrs. Donnelly had evidently a conviction that Renata, if advised that his time for the final disposition of his affairs was short, would at all events make a substantial provision in her favour—a conviction probably induced by the fact of their recent reconciliation, and also by her having heard Renata express sentiments hostile to two of the beneficiaries who, with their children, took a share of the fund to be invested under the will of 1887. Accordingly, from the Monday until the night of Wednesday, Mrs. Donnelly was constant in her endeavours to persuade one or other of the chiefs in congress assembled to approach Renata, to inform him of his hopeless condition, and to advise him of the necessity of making any change in his settlements which he might contemplate, without delay. Whether from feelings of delicacy, or other motives, none of the chiefs thus solicited appears to have been willing to undertake the ungracious task of assuring the sick man of the near approach of his dissolution. It is only natural to suppose that the respondent was not specially desirous that Renata should be stirred up to alter or modify the will already made in his favour; but beyond the suggestion that Dr. Faulknor was right, and that Renata's illness was not so deadly as Dr. Spencer supposed, he did nothing to dissuade or prevent any one who chose from acting on the advice given by Dr. Spencer.

Thus far the facts of the case are substantiated by the evidence given on both sides. It now becomes necessary to refer to the circumstances attendant upon the actual execution of the alleged new will, which, so far as direct evidence is concerned, rests upon the testimony of Mrs. Donnelly, and of Te Teira and Te Roera, the subscribing witnesses.

The account given by Mrs. Donnelly is, that on the Thursday morning, some time between 10 A.M. and 12 noon, she went into Renata's apartment, when she found him in bed attended by his two wives, of whom one in a little while went to sleep, and the other shortly after followed her example. So early as the Tuesday morning Mrs. Donnelly, in the expectation of Renata being informed of his condition and thereupon resolving to make a new will, provided herself with paper, pen, and ink, which she carried in her pocket in readiness for the emergency. When both his

wives had fallen asleep, Renata asked her, "Have you made my will?" To which she answered, "No." He said, "Why not?" She said, "Because I was waiting for you to tell me to do it." He said, "Well, do it now." She then said, "What am I to say?" He said, "My will to you and your teina (i.e., younger brothers and sisters) and your children." She then wrote the body of the will, to Renata's dictation, upon one of the sheets of paper which she had in her pocket; and, having done so, proposed to wake up one of his wives to fan him, whilst she went out in search of her uncle Te Teira. Renata said, "Never mind"; so she went out and found Te Teira at the gate, and, having told him to bring Te Roera with him, returned to Renata's apartment. Te Teira and Te Roera soon arrived; whereupon Renata asked if they had been told why they were sent for, and received an answer in the affirmative. The will was read aloud by Mrs. Donnelly, and Renata asked for a pen, but found that he was unable to sign his name, owing to physical weakness, and an injury to his right hand, which it is proved aliunde that he had actually suffered. He then, at her suggestion, made the mark with his own hand, and she afterwards wrote his name on either side of the mark. Renata, addressing Te Teira and Te Roera, said, "Friends, will you come and write your names to my will?" And they accordingly did so, and took their departure.

The attesting witnesses give substantially the same account with Mrs. Donnelly of their being called in, and of the reading and signing of the will in their presence. Their story is so far supported by the evidence of John Sturm, who says that on the Thursday forenoon he saw Te Teira standing in the vicinity of Renata's house, and by that of Mrs. Harper, an English nurse employed by Mrs. Donnelly, who states that, on the same forenoon, she carried a cup of beef-tea into Renata's room, where she found Mrs. Donnelly attending to his wants, whilst both his wives were fast asleep. On the other hand, the account given by Mrs. Donnelly and these witnesses is absolutely inconsistent with the evidence of the two wives of Renata, as well as that of the respondent and others, who say that they were in the house, and had opportunity of seeing what was done there, at the time when the will is alleged to have been made.

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To return to the history of the document in dispute. Mrs. Donnelly took and retained possession of it, and its existence did not become known to the respondent until after the death of Renata upon the Saturday. On the Thursday night and Friday morning Mrs. Donnelly communicated the fact that Renata had made a will in her favour, which was then in her keeping, to her husband and one or two persons, including Archdeacon Williams, whom she considered her friends. She herself says that, on the Thursday evening, she was informed by the witness Frederick Luckie that he had made arrangements with the respondent and James Carroll, who had acted as agent for Renata in the Land Court, to talk that night "about Renata's will," and that she thereupon "kept telling Luckie never to mind about it." On the Friday morning she told Mr. MacLean, her solicitor, and one of her witnesses, that she had not mentioned the will on the previous night, because, "if Luckie knew, he might think it his duty to tell Carroll and Broughton."

The principles applied by the Probate Court in England to a will obtained in circumstances similar to those which occur in the present case were explained by Sir John Nicholl in *Paske* v. *Ollat* (1). After stating that, when the person who prepares the instrument, and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person, the learned Judge goes on to say: "The presumption and onus probandi are against the instrument; but as the law does not render such an act invalid, the Court has only to require strict proof, and the onus of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestinity, and other circumstances which may increase the presumption even so much as to be conclusive against the instrument."

Having regard to the painful conflict of the evidence adduced by the parties in regard to matters about which there could be no difference between witnesses who were disposed to tell the truth, and to the observations upon native testimony given after a lapse of time, which were made in almost the same terms by the Chief Justice and by the Appeal Court, their Lordships

(1) 2 Phill. 323.

entirely concur in the opinion expressed by Richmond, J., to the effect that "the rules which govern Courts of Probate should by no means be relaxed in the case of alleged testamentary papers executed by Maoris on their deathbeds."

Omitting for the present any reference to the testimony of Archdeacon Williams, which, owing to the importance attached to it by the Judge of First Instance, must be separately noticed, their Lordships are of opinion, not only that the case put forward by the appellants is within the rule as stated by Sir John Nicholl, but that there are circumstances which make the presumption conclusive against the validity of the instrument which they propound.

First of all, it is a singular thing that Renata, who, even in the opinion of Mrs. Donnelly, was not likely to make a new will unless he was prompted to it, should on the Thursday morning have conceived the idea that he had already instructed Mrs. Donnelly to prepare a will for him, and had told her the terms in which it was to be made. It is not less singular, if he had resolved to make a new testamentary disposition of his affairs, that he should have entrusted the duty of preparing a proper document for that purpose to Mrs. Donnelly, instead of one or other of the agents whom he was in the habit of employing for business purposes, of whom there was no scarcity in Omahu at that time. If the will-making scene really began with the question, "Have you made my will?" that would suggest some doubts as to the mental condition of Renata, induced by physical weakness. He certainly was not in a good state for executing a settlement without the deliberate aid of some unprejudiced person. Dr. Spencer, who saw him just after the hour fixed by Mrs. Donnelly for the execution of the document, says that he was then weak and "sinking," and that on the Friday, the day to which the evidence of Archdeacon Williams applies, he was drowsy and "sinking fast."

Then the circumstance that Mrs. Donnelly was carrying about with her materials for writing out a will on the shortest notice is not calculated to beget any inference in favour of the appellants' case. Not less unfavourable to such an inference are the facts, that she undertook the task of writing the will herself, when

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Dr. Spencer (who had offered to do so) and so many others were at hand, who could have performed it without the imputation of interest, and that she called in her uncle and another relative, when it would have been so easy to obtain the attestation of witnesses above all suspicion.

Last of all, the transaction, according to Mrs. Donnelly's own narrative of it, was characterized by what Sir John Nicholl terms "clandestinity." Assuming the will to have been made as Mrs. Donnelly alleges, the fact that no outsider was present at its execution did not afford a legitimate reason for keeping its existence secret. If the witnesses on both sides are to be believed, Renata was not a man to be driven from his settled purpose; and if the fact that he had made a new will had been divulged, it is more than probable that there would have been no room now for any question either as to his having executed a will or as to his understanding of its terms.

Their Lordships now proceed to consider the evidence of Archdeacon Williams, which the learned Chief Justice accepted as sufficient to rebut all legal presumptions against the validity of the document of the 12th of April, 1887.

The reverend gentleman saw Renata three times on Friday, the 13th, in the morning, in the course of the day, and again at night. Before the first of these interviews took place he had been informed by Mrs. Donnelly, and had obviously a firm belief, that Renata had executed a will in her favour upon the day preceding. On the first occasion he put the question to Renata, "I suppose you have made your will to your satisfaction?" and Renata replied: "Yes, it is done," an answer which might refer with as much propriety to the will of 1887 as to the writing upon which the appellants rely. Upon the second, and the important occasion, Renata woke out of a sleep, and, addressing the Archdeacon, said, "You were asking me about my will." Renata, who spoke in the Maori language, then, pointing to Mrs. Donnelly, went on to say either "*It is in her favour*," or "*She has it.*" The witness is uncertain which of these expressions was used by the deceased. According to the evidence of the Archdeacon, Renata next referred to the withdrawal of Mrs. Donnelly's claims in the Land Court, which "was exceedingly

gratifying to him, and '*that now under existing circumstances I leave everything to her.*'" Shortly afterwards the deceased, closing his fist, said, "Yes, the question is in my hands—here it is," and then, opening his hand towards Mrs. Donnelly, said, "to that woman."

Their Lordships do not doubt that the strongest presumptions against the validity of a will, arising from the position of the parties by whom, and the circumstances in which it was prepared and executed, may be overcome by clear testimony shewing that the testator subsequently acknowledged that it was executed by him, and also that it gave effect to his intentions with regard to the final disposal of his property. The statements of Archdeacon Williams were accepted by the Chief Justice as clear and indubitable evidence to both these effects; they were discarded by the Court of Appeal, who were of opinion that, notwithstanding the confidence expressed by the witness in the accuracy of his own observation, he might have mistaken the import of what the dying chief said.

Although the honesty of the witness may be beyond question, it does appear to their Lordships that the testimony of one person, however honest, which depends to a large extent not only upon the accuracy of his hearing, but upon his previous belief as influencing the construction he was likely to put upon the language which he heard, is a somewhat narrow ground for setting aside the pregnant presumptions arising in this case from facts either admitted or proved beyond doubt. But they do not find it necessary to dispose of the evidence of Archdeacon Williams upon that consideration. The statements by Renata to which he speaks do not square with the terms of the instrument which is propounded and impeached in this suit. They mean that Renata had made a will leaving the whole of his property to the appellant Mrs. Donnelly, and can mean nothing else. But the writing of the 12th of April gives Mrs. Donnelly only one fifth of his succession, and gives the remaining four-fifths to persons for whom he had never expressed any predilection, and to whom he never referred as the objects of his bounty. The natural inferences suggested by these facts are either that Renata, if he did execute a document purporting to be a will on

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the 12th of April, did not understand its contents, or that the will in question is of domestic manufacture for the purpose of defeating the respondent's rights under the undoubted will of January, 1887.

In these circumstances, their Lordships have had no hesitation in coming to the conclusion that the decision of the Court of Appeal is in accordance with law; and they will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The appellants must pay the costs of this appeal.

Solicitors for appellants: *Sharpe, Parker, Pritchard, & Sharpe.*
Solicitors for the respondent: *J. & R. Gole.*

[PRIVY COUNCIL.]

J. C.* 1891 *April* 28, 29; *July* 18.

SILAS HARDING . . . . . APPELLANT;

AND

COMMISSIONERS OF LAND TAX . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Land Tax Act, 1877, *s.* 4, *sub-s.* 3—*Bonâ fide transfer for valuable consideration.*

Held, that, under the Land Tax Act, 1877, s. 4, sub-s. 3, according to its true construction, in order to exempt the owner of land from the payment of tax, the land must have passed from him, and the consideration passed from the transferee without any secret understanding or trust.

APPEAL from an order of the Supreme Court (March 5, 1888), affirming an order of Williams, J. (September 12, 1887).

The question was whether the appellant was, notwithstanding various conveyances executed by him and various payments alleged to have been made to him as detailed in the evidence, and various mortgages executed by the grantees under those conveyances, still to be regarded as a transferor of landed estate

* *Present*:—LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

not made bonâ fide for valuable consideration within the meaning of the Land Tax Act, 1877, s. 4, sub-s. 3.

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Crackanthorpe, Q.C., and *Cowell*, for the appellant.

Sir *H. Davey*, Q.C., *Finlay*, Q.C., and *Gurney*, for the respondent.

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The judgment of their Lordships was delivered by

LORD MORRIS:—

This case comes before their Lordships on the appeal of Silas Harding from an order of the full Court of Victoria, dated the 5th of March, 1888, which dismissed his appeal from an order of Williams, J., dated the 12th of September, 1887. The last-mentioned order discharged a previous order nisi obtained by Silas Harding on the 3rd of December, 1886, by which the Registrar of Land Tax was ordered to shew cause why he should not remove the name of Silas Harding from the Land Tax Register in respect of certain lands set forth in the schedule to the order. The appellant was previous to the passing of the Land Tax Act, 1877, entitled as owner to certain large landed estates. On the passing of the Act he was desirous to except his estates from the operation of the Act. By sect. 4, sub-sect. 3 of the Act, it is enacted that "Every settlor, grantor, assignor, or transferor of any landed estates comprised in any settlement, grant, assignment, transfer, or conveyance, not made bonâ fide for valuable consideration," shall be deemed to be an owner of landed estates for the purposes of the Act.

The appellant, on the 22nd of September, sent in four separate applications to the Registrar of Land Tax for the removal of his name from the register, declaring that he had conveyed the lands, and was not the owner within the meaning of the Land Tax Act, 1877. With respect to the lands comprised in the first application, he alleged that, by indentures dated the 4th of December, 1878, and the 8th of February, 1879, he had conveyed the lands comprised in the said first application to Silas George Tangye, and to Mary Tangye his wife. With respect to the lands comprised in the second application, he

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alleged that by indentures dated the 22nd of February, 1879, the 25th of February, 1879, the 25th of February, 1879, and the 26th of February, 1879, he had conveyed the lands comprised in the said second application to Richard Howell, to Elizabeth Howell, wife of the said Richard Howell, and to Silas George Tangye, and to Mary Tangye his wife. With respect to the lands comprised in the third application the appellant alleged that by an indenture dated the 5th of December, 1885, he had conveyed the lands comprised in the said third application to Silas George Tangye. With respect to the lands comprised in the fourth application, he alleged that by an indenture dated the 5th of December, 1885, he had conveyed the lands comprised in the said fourth application to Silas George Tangye.

The several conveyances relied upon by the appellant as transferring the said several parcels of land were formally executed, and the sole question for decision is whether or not these conveyances were made bonâ fide for valuable consideration. If they were so made, the Registrar should remove the appellant's name from the register; if they were not so made, the applications were rightly refused. Both Williams, J., and on appeal the Full Court, have decided this question against the appellant, and have held that he did not part with the said lands by grants made bonâ fide for valuable consideration. Their Lordships entirely concur in these decisions. One of the objects of the Land Tax Act, was to prevent sham sales for the purpose of evading the land tax, and the meaning of sub-sect. 3 of sect. 4 is, that as between transferor and transferee there must be the passing of the estate from the transferor and the passing of the consideration from the transferee, without any secret understanding or trust. It would be most difficult to track the appellant through the complicated series of sham dealings with his nephew and manager, Silas George Tangye, and with his brother-in-law and overseer, Richard Howell, the pretended transferees in the conveyances.

The indentures of 1878 and 1879 present almost every badge of fraud. They were not accompanied by change of possession. The pretended considerations were bills of exchange, for which payment was not made, or asked as they fell due. The appellant

continued his dealing with the lands in a manner quite irreconcileable with any bonâ fide transfer of them. The transferees were near relatives, and in his employment at small salaries. The contradictory and false statements made by him further lead to the conclusion that these conveyances were mere covers to enable him to escape the payment of land tax.

With respect to the lands comprised in the third and fourth applications to the Registrar of Land Tax, the appellant alleges that by an instrument of the 5th of December, 1885, he conveyed bonâ fide for valuable consideration the said lands to Silas George Tangye. It appears that he had previously in 1878 conveyed them to his wife. That conveyance was a voluntary one, but by means of it he succeeded for a time in getting his name removed from the register. His wife died in 1882, and in July, 1883, he purported to sell and convey the same lands to Silas George Tangye as a bonâ fide sale for value. The next of kin of the appellant's wife impeached the sale to Silas George Tangye, and on a trial before a jury in October, 1885, the sale to Silas George Tangye was found to be a sham sale. Very soon after the trial the appellant conveyed by an instrument of the 5th of December, 1885, the same lands to the same Silas George Tangye, and he now relies upon it. In the administration suit by the next of kin of Mrs. Harding, this Board, on appeal, held that the appellant, as administrator of his wife's estate, was not beneficially entitled to the estate, but was under obligation to realize it and distribute it according to law: *Harding* v. *Howell* (1).

Now the indenture of the 5th of December, 1885, relied upon by the appellant as transferring the estate to Silas George Tangye, is made expressly "in his own right, and not as administrator," and the consideration is stated to be £8475. But the appellant had no title in his own right; he was only a trustee, and the consideration was raised on the same day by the grantee by mortgage. In fact, the appellant, by the conveyance to his wife, sought to evade the land tax; by the conveyance to Tangye in 1883 he sought to defraud the next of kin of his wife; and by the indenture of December, 1885, he appears to seek to defraud both.

(1) 14 App. Cas. 307.

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Their Lordships are of opinion that the decision of Williams, J., affirmed by the Full Court, was correct, and ought to be affirmed, and the appeal dismissed with costs, and they will so humbly advise Her Majesty.

Solicitor for appellant: *J. Harwood.*
Solicitors for respondents: *Freshfields & Williams.*

[PRIVY COUNCIL.]

J. C.* 1891 *May* 8; *June* 13.

POLLARD . . . . . PLAINTIFF;

AND

HARRAGIN. . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Law of Trinidad—Practice—Order 28, *r.* 12—*Order* 36, *r.* 18—*Order* 57, *r.* 6—*Duties of the Court.*

Where a plaintiff's demurrer to a defendant's plea is overruled and the real merits of the suit have not been disposed of, the Court should, under Order 28, r. 12, make such order as will allow them to be properly tried in accordance with the Rules of Court relating thereto.

Under Order 36, r. 18, a defendant on the non-appearance of the plaintiff is entitled to judgment dismissing the action; but it is irregular in such a proceeding for the judge to take evidence and adjudicate thereon.

Order 57, r. 6, does not authorize the Court to abridge the time allowed for trial in such manner as to preclude a fair hearing. Where a demurrer has been overruled and liberty given to plead the case ought not to be set down for trial till the time allowed by the rules has elapsed or without proper notice.

APPEAL from an order of the Supreme Court (Dec. 17, 1889) whereby a motion by the appellant to have a certain judgment, dated the 2nd of December, 1889, set aside for irregularity was dismissed with costs. The said judgment was entered for the respondent in an action by the appellant to recover £600 damages for assault and false imprisonment.

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

The proceedings in the suit in reference to which the motion was made sufficiently appear in the judgment of their Lordships.

The appellant appeared in person.

J. G. Wood (Sir *H. Davey*, Q.C., with him), for the respondent.

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The appellant brought an action against the respondent, an acting stipendiary justice of Port of Spain, in the Supreme Court of Trinidad and Tobago, for assault and battery and false imprisonment, claiming £600 as damages. The writ was issued on the 28th of October, 1889, and the statement of claim was delivered on the 31st of October. On the 8th of November the defendant, in his statement of defence, pleaded not guilty by statute. On the 25th of November the plaintiff demurred to the defence, on the ground that the section or sections of the Ordinance referred to in it had not been inserted in the margin, and on other grounds, and gave notice to the defendant that the demurrer was set down for argument on the 27th of November. The demurrer came on for argument on the 29th of November before Lumb, J., who made the following order: "Upon hearing what was alleged on both sides, the Court doth order that the said demurrer be overruled, with costs to be paid by the said plaintiff to the said defendant; and doth further order that the said plaintiff do deliver to the defendant, before 4 o'clock P.M. this day, a reply to his statement of defence; that the case be set down for trial on Monday, the 2nd day of December, 1889, and that the said defendant do accept short notice of trial."

The practice of the Court is governed by the rules in the schedule to the Ordinance for the Constitution of the Supreme Court made in 1879. The rule under which this order was made is rule 12 of Order 28, which is: "Where a demurrer is overruled the Court may make such order and upon such terms as to the Court shall seem right for allowing the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to." The 29th of November

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was Friday, the following day was a half-holiday, then came Sunday, and thus the plaintiff had no time to prepare for the trial. And it is to be observed that by Order 24, r. 1, the plaintiff had three weeks after the defence had been delivered to deliver his reply, and the 29th of November was the last day of the three weeks. The defendant was therefore not in a worse position than if the plaintiff instead of demurring had delivered the reply on the last day allowed to him for it. The meaning of rule 12 appears to be that where the real merits of the controversy have not been disposed of on the demurrer, the Court should make such an order as would allow them to be properly tried. The order for trial on the Monday went very far, if not entirely, to prevent this, as far as the plaintiff was concerned. And it does not appear that the learned judge had before him any ground for making so peremptory an order. By Order 36, rr. 3, 4, actions are to be tried and heard either before a judge or judges, or before a judge and jury, and the plaintiff may with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of those modes of trial. By rule 6 a party to whom notice of trial is given may move the Court to appoint a different mode of trial from that specified in the notice of trial, upon giving notice of motion within four days from the time of the service of the notice of trial. If the case was to be heard on the Monday these rules could not be followed, and the effect of the order was practically to deprive the plaintiff of having a trial by jury apparently without any argument upon that matter.

The plaintiff on the day on which the order was made gave notice to the defendant that he discontinued the action. This he was not at that stage of the action at liberty to do, and the discontinuance was altogether invalid.

On the 2nd of December the case came on for hearing before Lumb, J. The defendant appeared by counsel; the plaintiff did not appear. Order 36, r. 18, says: "If when an action is called on for trial the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action." There was no counter-claim here, and it appears from the judge's

notes that the defendant's counsel claimed that the defendant was entitled to judgment under that rule. The learned judge, instead of dismissing the action, took the evidence of the defendant and his witnesses, and then gave judgment for the defendant, with costs. No reason appears in the judge's notes for this very irregular proceeding. Their Lordships will only observe that the evidence taken appears to them to be such as it would be proper to submit to a jury, and the plaintiff might be seriously prejudiced by not having a trial by a judge and jury. On the 13th of December the plaintiff made an affidavit that the trial of the action was fixed for the 2nd of December without his consent, and on the 17th of December he moved the Court, consisting of the Chief Justice and another judge and Lumb, J., by counsel for an order to set aside the judgment as irregular. The defendant's counsel objected that the motion was really an appeal from a judgment, and that notice of appeal had not been properly given. The Court, after hearing arguments, allowed the appellant to put his motion in form as an appeal, by affixing the stamp fee for appeals, and the case to be heard as an appeal, the respondent not further objecting. After hearing the appellant's counsel, the Court held that the order of the 29th of November was a proper order under Order 28, r. 12; and as to the objection that judgment was entered up before the time for setting the action down for trial had elapsed and without any notice of trial, the Court held that the judge had ample discretion under Order 57, r. 6. That rule is: "A Court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging or abridging time for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require." Their Lordships doubt whether this rule is applicable where a demurrer is overruled and an order made for allowing the demurring party to plead. If it is, and assuming that it gives the fullest discretion to the judge, they are of opinion that the discretion was in this instance improperly exercised, so as to constitute a substantial denial of justice. The intention of rule 6 appears to their Lordships to be that the demurring party shall not be concluded by a judgment on demurrer, which does not decide

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the case on the merits. The plea of the defendant did not state any facts, and none were admitted by the demurrer. The defendant ought to have been allowed to raise by pleading his case on the facts, and to have had a reasonable time for proceeding to trial. By Order 36, r. 5, the plaintiff is allowed six weeks to give notice of trial, and that is a ten days' notice. If short notice of trial may be given, that is a four days' notice. These provisions, as well as those in the rules, as to the mode of trial appear to have been entirely disregarded in the order of the 29th of November, 1889. Their Lordships are of opinion that this order, except so far as it overruled the demurrer with costs, should be set aside, that the judgment of the 2nd of December, 1889, and subsequent proceedings should also be set aside, and that the defendant should pay to the plaintiff his costs incurred in the Court below subsequently to the order of the 29th of November, 1889. The plaintiff should have leave to reply to the defendant's plea within three months from the date of Her Majesty's Order in Council upon this appeal, and to proceed to trial according to the practice of the Supreme Court. Their Lordships will humbly advise Her Majesty accordingly.

The respondent will pay to the appellant his costs of this appeal, but from the date on which the appellant was permitted to proceed with his appeal in formâ pauperis his costs will only be allowed on that footing.

Solicitor for appellant: *H. R. Elton.*
Solicitors for respondent: *Sutton, Ommanney, & Rendall.*

[PRIVY COUNCIL.]

MACLEOD . . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Criminal Law Amendment Act, 1883, *s.* 54—*Criminal Jurisdiction—Offences committed without the Colony.*

Sect. 54 of the Criminal Law Amendment Act, 1883 (46 Vict. No. 17), enacts that, "whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years":—

Held, that these words must be intended to apply to those actually within the jurisdiction of the Legislature, and consequently that there was no jurisdiction in the Colony to try the appellant for the offence of bigamy alleged to have been committed in the United States of America.

APPEAL on special leave from an order of the Supreme Court (July 4, 1890) dismissing an appeal by way of special case from the conviction of the appellant by the Court of Quarter Sessions at Sydney in that Colony, for bigamy, such appeal being upon points reserved at his trial by the chairman of that Court.

The conviction took place in May, 1890, the points reserved being as to the admissibility of certain documentary evidence as to the second marriage, and as to misdirection in the chairman's saying that it was incompetent for an American Court to divorce from the former marriage which had been celebrated in New South Wales, and as to the absence of any evidence of the law of Missouri relating to the validity of the ceremony of second marriage.

Fullarton, for the appellant, contended that the Court had no jurisdiction to try the appellant at all for the alleged offence. The Act under which he was tried relates according to its true

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

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construction to offences committed within the jurisdiction of the local legislature by persons subject at the time of the offence to its jurisdiction: see 46 Vict. No. 17, s. 54. Upon any other construction it would be ultrà vires, the local legislature deriving from the Imperial Parliament a jurisdiction limited to the extent of the colony.

[THE LORD CHANCELLOR:—Their Lordships will hear the question of jurisdiction argued before coming to the other points in the case.]

Rigby, Q.C., and *Pollard*, for the respondent, contended that the point of jurisdiction had never been taken in the Colony. Full legislative power had been given to the local legislature: and see 24 & 25 Vict. c. 100, s. 57, and 9 Geo. 4, c. 83, s. 24.

Fullarton, was not heard in reply.

The judgment of their Lordships was delivered by

LORD HALSBURY, L.C.:—

The facts upon which this appeal arises are very simple.

The appellant was, on the 13th of July, 1872, at Darling Point, in the Colony of New South Wales, married to one Mary Manson, and, in her lifetime, on the 8th of May, 1889, he was married, at St. Louis, in the State of Missouri, in the United States of America, to Mary Elizabeth Cameron. He was afterwards indicted, tried, and convicted, in the Colony of New South Wales, for the offence of bigamy, under the 54th section of the Criminal Law Amendment Act of 1883 (46 Vict. No. 17).

That section, so far as it is material to this case, is in these words: "Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years." In the first place, it is necessary to construe the word "whosoever"; and in its proper meaning it comprehends all persons all over the world, natives of whatever country. The next word which has to be construed is "wheresoever." There is no limit of person, according to one construction of "whosoever"; and the word "wheresoever" is equally universal in its applica-

tion. Therefore, if their Lordships construe the statute as it stands, and upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that Colony. That seems to their Lordships to be an impossible construction of the statute; the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words "Whosoever being married" mean, "Whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales."

The word "wheresoever" is more difficult to construe; but when it is remembered that in the Colony, as appears from the statutes that have been quoted to their Lordships, there are subordinate jurisdictions, some of them extending over the whole Colony, and some of them, with respect to certain classes of offences, confined within local limits of venue, it is intelligible that the 54th section may be intended to make the offence of bigamy justiceable all over the Colony, and that no limits of local venue are to be observed in administering the criminal law in that respect. "Wheresoever," therefore, may be read, "Wheresoever in this Colony the offence is committed."

It is to be remembered that the offence is the offence of marrying, the wife of the offender being then alive—going through, in fact, the ceremony of marriage with another person while he is a married man. That construction of the statute receives support from the subordinate arrangements which the statute makes for the trial, the form of the indictment, the venue, and so forth. The venue is described as New South Wales, and sect. 309 of the statute provides that "New South Wales shall be a sufficient venue for all places, whether the indictment is in the Supreme Court, or any other Court having criminal

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jurisdiction. Provided that some district, or place, within, or at, or near which, the offence is charged to have been committed, shall be mentioned in the body of the indictment. And every such district or place shall be deemed to be in New South Wales, and within the jurisdiction of the Court, unless the contrary be shewn." That, by plain implication, means that the venue shall be sufficient, and that the jurisdiction shall be sufficient, unless the contrary is shewn. Upon the face of this record the offence is charged to have been committed in Missouri, in the United States of America, and it therefore appears to their Lordships that it is manifestly shewn, beyond all possibility of doubt, that the offence charged was an offence which, if committed at all, was committed in another country, beyond the jurisdiction of the Colony of New South Wales.

The result, as it appears to their Lordships, must be that there was no jurisdiction to try the alleged offender for this offence, and that this conviction should be set aside. Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, "Extra territorium jus dicenti impune non paretur," would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords in *Jefferys* v. *Boosey* (1), expresses the same proposition in very terse language. He says (2): "The Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons, must, primâ facie, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect." All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her

(1) 4 H. L. R. 815. (2) 4 H. L. R. 926.

Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was ultrà vires of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony.

For these reasons, their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court should be reversed, and that this conviction should be set aside. The respondent must pay the costs of the appeal.

Solicitors for appellant: *Yeilding, Barlow, & Piper.*
Solicitor for respondent: *Randolph C. Want.*

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CALLENDER, SYKES & CO. . . . . PLAINTIFFS;

AND

COLONIAL SECRETARY OF LAGOS AND DAVIES . . . . . DEFENDANTS.

AND

WILLIAMS . . . . . DEFENDANT;

AND

DAVIES . . . . . PLAINTIFF.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE SUPREME COURT OF LAGOS.

Law of Lagos — Bankruptcy—Land of Bankrupt in Lagos vests in Trustee under Act of 1869*—Jurisdiction of Supreme Court.*

Held, that the Supreme Court of the Gold Coast Colony had no bankruptcy jurisdiction in 1877, and, therefore, could not act as an auxiliary to the English Court under sect. 74 of the Bankruptcy Act, 1869.

Held, further, that the English Bankruptcy Act of 1869 applies to all Her Majesty's dominions, and therefore that an adjudication under that Act operates to vest in the trustee in bankruptcy the bankrupt's title to real estate situate in Lagos, subject to any requirements prescribed by the local law as to the conditions necessary to effect a transfer of real estate there situate.

Some of the bankrupt's land having been taken under the Public Lands Ordinance, 1876, *held*, that costs were rightly given under sect. 8 of the Petitions of Right Ordinance, 1877, against the Government who had resisted payment of the price to the appellants.

CONSOLIDATED appeals from two orders of the Supreme Court (May 30 and 31, 1889), made in the above suits.

On the 19th of April, 1880, Macleod, J., by an order of Court, declared that the properties in these suits formed part of and belonged to the estate of the respondent Davies at the date of his adjudication as a bankrupt in 1876, and had consequently passed

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

to Halliday, his trustee in bankruptcy. Previously thereto, on the 12th of January, 1877, the County Court of Lancashire had, by order under sect. 74 of the Bankruptcy Act of 1869, sought the aid of the Court of Civil and Criminal Justice of Lagos to act as an auxiliary of the said County Court in all matters arising out of the bankruptcy connected with the property of the bankrupt on the West Coast of Africa. Under the order of April, 1880, Halliday in June took possession of all the said properties.

On the 22nd of April, 1881, the Full Court of Appeal of the Supreme Court, upon a point of law reserved by Macleod, J., held that the Supreme Court of the Colony, which at that time was the Court of the Gold Coast Colony, had no bankruptcy jurisdiction under its charter.

The facts out of which these suits arise and the proceedings therein are sufficiently stated in the judgment of their Lordships.

The Divisional Court decided against the claim of Callender, Sykes & Co., but in favour of that of Williams.

The Court of Appeal allowed the appeal of *Davies* v. *Williams*, and ordered Williams to deliver up possession of the property claimed to Davies. This decision involved the dismissal of the other appeal and the right of Davies to the amount claimed by Callender, Sykes & Co.

The Court held that the order of Macleod, J., was a nullity and void, on the ground that the Supreme Court had no jurisdiction in bankruptcy and could not act as auxiliary to the Bankruptcy Court in England, under sect. 74 of the Act of 1869. That Act, it was further held, was not of general application in the Colonies, and could not therefore affect the title to realty situate in Lagos.

Asquith, Q.C., *C. E. Jones*, and *Roskill*, for the appellants, after contending that at the date of Macleod, J.'s order the Supreme Court of the Gold Coast Colony had bankruptcy jurisdiction within the meaning of sect. 74 of the Bankruptcy Act, 1869, argued that, whether that were so or not, Halliday was entitled to the whole of the estate, real and personal, of the bankrupt Davies. The Act of 1869 was an Imperial Act, and

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by its true construction applied to the Colony of Lagos: see sects. 73, 74, and 76. Under its terms the land of the bankrupt situate in Lagos vested in his trustee appointed by the Court after an order of adjudication: see sects. 4, 14, 15, 17, 18 and 19. Such was the intention and policy of the Act, and the words used are not inconsistent therewith. Other Bankruptcy Acts have the same policy and intention expressed, perhaps, more clearly. From 1542 to 1824 the Acts of this nature contain nothing express as to the locality of the land referred to. But later on the Acts in express terms relate to land abroad: see 5 Geo. 4, c. 98, s. 61; 6 Geo. 4, c. 16, s. 64; 12 & 13 Vict. c. 106, s. 142; 32 & 33 Vict. c. 71, ss. 4, 14, 48, where no restrictive intention, at all events, is expressed. Reference was made to *Ex parte Rogers* (1); *Ellis* v. *McHenry* (2). The Act of 1869 was repealed by that of 1883 (46 & 47 Vict. c. 52), which in sect. 168 refers to land "situate in England or elsewhere." See also sect. 2. Reference was made to *In re Artola Hermanos* (3); *Solomons* v. *Ross* (4). Reference was also made to the Supreme Court Ordinance of the Gold Coast Colony, 1876, sect. 11. Halliday, therefore, had a valid title to the bankrupt's land and other property in Lagos, and accordingly the appellants who derived title from him were entitled to succeed.

Herbert Reed, and *W. E. Vernon*, for the respondent Davies, contended that the Supreme Court of the Colony had no jurisdiction to make the order of the 19th of April, 1880, or that of the 4th of June, 1880, under which the trustee in bankruptcy obtained possession of the properties in suit. It had no jurisdiction in bankruptcy at all, and could not act as auxiliary to the Bankruptcy Court in England. Further, the Act of 1869 did not vest in Halliday real property situated in Lagos belonging to the bankrupt. The words of the Act of 1869 were very limited as compared with those of the Act of 1883, sect. 168, and should receive a limited construction. Those sections which extend beyond England do not specify land. Land in the colonies is nowhere mentioned. Reference was made to Cooke's Bank-

(1) 16 Ch. D. 665.
(2) Law Rep. 6 C. P. 228.
(3) 24 Q. B. D. 640.
(4) 1 H. Bl. 131, n.

rupt Laws, ed. 1823, p. 333; *Selkrig* v. *Davies* (1); *Cockerell* v. *Dickens* (2); Story's Conflict of Laws, s. 428; *Ex parte O'Loghlen* (3).

C. E. Jones, replied.

July 11. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

These suits are governed by the same legal principles, and the person interested in resisting the claim of the appellants is the same in both cases, viz., the respondent, J. P. L. Davies. The appeals have therefore been consolidated, and Davies has been added as a respondent in the suit against the Colonial Secretary of Lagos, to which he was not originally a party.

The main question is, whether land belonging to Davies, and situated in the Colony of Lagos, passed to James Halliday, who, on the 8th of January, 1877, was appointed trustee of Davies's property in bankruptcy. Davies was adjudicated a bankrupt on the 9th of August, 1876. On the 12th of January, 1877, the county court of Lancashire made an order under sect. 74 of the Bankruptcy Act, 1869, for the purpose of seeking the aid of the Court of Civil and Criminal Justice of the Settlement of Lagos in the administration of the bankrupt's estate. In pursuance of that order inquiries were made in the Supreme Court of the Gold Coast Colony, to which Lagos then belonged, which resulted in this discovery of property which the bankrupt had concealed. So far the facts are common to both suits.

It will now be convenient to follow the history of the property called the Broad Street property, which is the subject of the suit brought by Davies against the appellant Williams. That property was purchased by Davies on the 31st of January, 1871. On the 30th of October, 1878, Davies and his wife made an attempt to include it among certain properties settled on his wife, himself, and their children in the year 1864, by inserting it in a schedule of trust property appended to an appointment of new trustees of the settlement. That attempt has been treated in

(1) 2 Rose, 291. (2) 3 Moo. P. C. 98.
(3) Law Rep. 6 Ch. 406, 411.

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the Court below by Hutchinson, J., as fraudulent, and intended to cheat Davies's creditors. But it led to an assertion of title by the trustees, or by Davies in their names, and to litigation in the Supreme Court of the Gold Coast Colony. The dispute was for the time ended by an order dated the 4th of June, 1880, directing the deputy registrar to make delivery of the property to Halliday.

This order was made by Macleod, J., on the application of Halliday, and after hearing Davies and the trustees, under the impression that the Supreme Court possessed a bankruptcy jurisdiction, and was bound to act as auxiliary to the English Court. On the 22nd of April, 1881, the Supreme Court decided that no such jurisdiction existed. But Halliday had been placed in possession, and no attempt was made by the trustees to disturb him.

On the 11th of November, 1881, Halliday agreed to sell the property to Williams for the sum of £400 then paid by him. Immediate possession was given to Williams, who retained it up to the commencement of the action against him which was brought in the Supreme Court of the Colony of Lagos on the 26th of January, 1889. Davies had procured his discharge in the year 1884. In the year 1886 Lagos was made a separate colony, with a Supreme Court of its own.

The writ of summons was headed, "J. P. L. Davies, agent; trustees of the marriage settlement of Sarah Forbes Bonella Davies, deceased." What exactly was intended by this ambiguous heading was not made clear; but the Court, finding that in point of fact the trustees were not taking any action, caused the heading to be amended by striking out all reference to them. The suit therefore remained, and is, that of Davies alone.

Smalman Smith, J., who heard the case in the first instance, gave judgment for the defendant Williams, apparently against his own opinion, and because he did not think it right to decide against the opinion of Macleod, J. Davies appealed to the Full Court, consisting of three judges, of whom Smalman Smith, J., was one; and that Court was unanimous in reversing the judgment below, and entered judgment for Davies. It is against that judgment that the present appeal of Williams is brought.

The reasons for the judgment are very clearly stated by the three learned judges. First they hold, in accordance with the opinion expressed by the Supreme Court of the Gold Coast Colony in 1881, and on grounds which appear to their Lordships to be quite sound, that that Court had no bankruptcy jurisdiction in Lagos. That being so, it could not be auxiliary to the English Court under the Act of 1869. That leads them to the inference that the order of Macleod, J., was a mere nullity. Their Lordships do not stop to discuss the precise effect of an order made by a Court having jurisdiction to deal with the property in a suit properly constituted, and having before it the parties interested in the dispute, but purporting to act in the exercise of a jurisdiction which it did not possess. That discussion is unnecessary, because the Court did not treat the nullity of Macleod, J.'s order as conclusive against Williams, but only as leaving open the fundamental question whether the Act of 1869, under which the bankruptcy took place, did or did not confer title on Halliday.

Sect. 4 of that Act defines property in very general terms—"land, and every description of property whether real or personal." This is the subject-matter which by sect. 14 is divisible among the bankrupt's creditors; by sect. 15 the divisible property is again described as "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance;" by sect. 17 it is made to vest in the registrar first, and, when a trustee is appointed, in the trustee; by sect. 19 the bankrupt is to aid in its realization to the utmost of his power; and by sect. 48, if he makes default in giving it up, his discharge may be withheld. There are other sections in the Act, such as 73, 74, and 76, which shew that it is to have operation in the whole of the British Empire. But the sections relating to property do not in express terms specify property in the Colonies, and those which expressly extend beyond England do not in express terms specify land.

The Supreme Court lay down the principle that an Imperial Act does not apply to a colony unless it be expressly so stated or necessarily implied; they point out that there is no case

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deciding that land in a colony passes under sect. 17; and they dwell on the inconvenience which would arise from conflicts of law if an English statute were to transfer land beyond the limits of the United Kingdom. On these grounds, they hold that under the word "property" land in Lagos does not pass.

Upon this reasoning their Lordships first have to remark that there is no question here of any conflict between English and foreign law. Lagos was not in the year 1869, and is not, a foreign country. How far the Imperial Parliament should pass laws framed to operate directly in the Colonies is a question of policy, more or less delicate according to circumstances. No doubt has been suggested that if such laws are passed they must be held valid in Colonial Courts of Law. It is true that the laws of every country must prevail with respect to the land situated there. If the laws of a Colony are such as would not admit of a transfer of land by mere vesting order or mere appointment of a trustee, questions may arise which must be settled according to the circumstances of each case. Such questions are specially likely to arise in those Colonies to which the Imperial Legislature has delegated the power of making laws for themselves, and in which laws have been made with reference to bankruptcy. The contrivance of statutory transfer has grown out of the older plans of conveyance by or on behalf of the bankrupt; and probably none of the Bankruptcy Acts would be held to pass land more completely than the bankrupt himself could pass it by conveyance. But the general law of Lagos is English law, and it does not appear that in 1877 there had been, or indeed that there ever has been, any local legislation which would prevent land being transferred in Lagos as freely as it may be in England. The only question that has been argued in this case with respect to the transfer of title is the question whether the Act of 1869 is calculated to transfer title to Colonial land; and with that question conflicts between British and foreign law have nothing to do. Nor do the learned judges take notice that, if there is any difficulty in effecting a transfer of land not in England, it must arise and be dealt with under those Bankruptcy Acts which indisputably purport to transfer land elsewhere.

If a consideration of the scope and object of a statute leads to

the conclusion that the legislature intended to affect a Colony, and the words used are calculated to have that effect, they should be so construed. It has been pointed out above that some sections of the statute clearly bind the Colonies in words which do not necessarily, but which may, apply to land. But the policy of the legislature is clearly shewn by reference to other statutes. By the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106), s. 142, all lands of the bankrupt "in England, Scotland, Ireland, or in any of the Dominions, Plantations, or Colonies belonging to Her Majesty, are to vest in his assignees." By the Bankruptcy Act of 1883 (46 & 47 Vict. c. 52), s. 168, the property which is passed to the trustee includes "land, whether situate in England or elsewhere." The Scotch Act of Bankruptcy, passed in 1856 (19 & 20 Vict. c. 72), s. 102, vests in the trustee the bankrupt's "real estate situate in England, Ireland, or in any of Her Majesty's dominions." The Irish Act of Bankruptcy passed in 1857 (20 & 21 Vict. c. 60), s. 268, vests in the bankrupt's assignees all his land "wheresoever situate." No reason can be assigned why the English Act of 1869 should be governed by a different policy from that which was directly expressed in the Scotch and Irish Acts, and in the English Acts immediately preceding and immediately succeeding. It is a much more reasonable conclusion that the framers of the Act considered that in using general terms they were applying their law wherever the Imperial Parliament had power to apply it; and their Lordships hold that there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a colony.

It is true that no judicial decision to this effect can be found. But it has been the prevailing opinion among lawyers. This may be illustrated by a dictum of Sir George Jessel in the case of *Ex parte Rogers* (1). It was pointed out that the law of Ceylon required registration to pass land, and the learned judge observed, speaking of the Act of 1869, "It only passes immoveable property in the Colonies according to the law of the Colonies." That is not a decision, but it shews the impression of a very learned and accurate lawyer that the Act of 1869 did affect land

(1) 16 Ch. D. 666.

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in the Colonies. The same opinion is given in Mr. Justice Vaughan Williams's Treatise on Bankruptcy. In the last edition (5th), p. 181, it is said: "The Act of 1869 contained no express provision as to [the locality of] real property, but did not seem to be intended to alter the law." No opinion to the contrary has been brought to their Lordships' attention except the decision under appeal.

Their Lordships, therefore, hold that on the appointment of Halliday in January, 1877, the Broad Street property vested in him, and that Davies had no interest in it subsequent to the adjudication in August, 1876. His action should have been dismissed with costs. A decree to that effect should now be made in lieu of the decrees of the Courts below which should be discharged, and Davies should also be ordered to pay the costs of the appeal to the Full Court.

The other appeal (*Callender, Sykes & Co.* v. *Colonial Secretary of Lagos and Davies*) relates to a property called the Oil Mills, which was one of those which Davies did not disclose to his trustee, and which he endeavoured to include in his post-nuptial settlement. The whole of the disclosed properties were purchased in the year 1877 by Messrs. Sykes and Mather, partners in the firm of Callender, Sykes & Co., from the trustee Halliday. Afterwards came the inquiry by Macleod, J., who held that the Oil Mills property was vested in Davies at the date of his bankruptcy, and that his claim to have it included in the settlement was a fraudulent claim. On the 19th of April, 1880, Macleod, J., made an order for delivery of this property among others to Halliday, who was placed in possession on the 28th of June, 1880. The trustees of the settlement were represented throughout the whole of these proceedings. They have never made any attempt to disturb the possession given under Macleod, J.'s order, notwithstanding the judgment of the Supreme Court of the Gold Coast Colony in April, 1881.

On the 3rd of February, 1881, Messrs. Sykes and Mather agreed to purchase the Oil Mills property of Halliday, and paid the purchase-money. They at once entered into possession, and their title has since been confirmed by a formal conveyance. They held possession until the year 1889, when the property was

wanted by the Government of Lagos, who took it under the provisions of the Public Lands Ordinance, 1876, which was passed by the Gold Coast Colony when Lagos formed part of it. The value of the property was ascertained at the sum of £1007 17*s.* 4*d.*

Messrs. Callender, Sykes & Co. then brought an action for that purchase-money in the Supreme Court of Lagos against the Government, the Colonial Secretary being the formal defendant. It does not appear that Davies was made a party to the action; but he appeared in Court and cross-examined the plaintiffs' witnesses. Neither does it appear what lines of objection were taken by Davies or by the Colonial Secretary; only that the latter appeared by the Queen's Advocate, who cross-examined the Plaintiffs' witnesses. Their Lordships must take it, on the materials before them, that the Colonial Secretary, as defendant on the record, and Davies in some less formal way, opposed the claim of the plaintiffs to have the purchase-money paid to them

Smalman Smith, J., who tried the case, rejected the claim of the plaintiffs' because he said it was founded on the order of Macleod, J., which was a nullity. On appeal, all parties agreed that the case must be governed by the decision in *Davies* v. *Williams*. It must now be governed by the decision of Her Majesty in Council. Davies's interest in the Oil Mills property passed out of him on the adjudication, and vested in Halliday on his appointment. All Halliday's interest passed to the appellants, Callender, Sykes & Co. If any conflicting interest could exist, it would be that of the trustees of the settlement; and the existence of such an interest is suggested by Davies. But the trustees themselves have not come forward to assert any interest. They have never disputed the possession given to Halliday under the order of the 4th of June, 1880, irregular though it was. The appellants had been in undisturbed possession for nine years when the Government took the property from them. As between them and the Crown their title is clearly established; and it would be a serious hardship on them if the claims made by or on behalf of the trustees in the year 1880 were now to be considered as forming a substantial cloud upon their title so as to call for the further retention of the fund.

The decrees of the lower Courts should be discharged, and in

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lieu thereof a decree should be made declaring that the appellants, Callender, Sykes & Co., were entitled to the Oil Mills property when taken by the Government of Lagos, and to the purchase-money thereof, and ordering payment accordingly.

A considerable time after the argument was closed, the Colonial Secretary desired leave to appear by counsel at their Lordships' bar for the purpose of opposing any such alteration of the decrees below as might have the effect of charging him with the costs of the litigation. He has been allowed to do so, and he has contended, with respect to the litigation in the Colony, that the Supreme Court has no jurisdiction to give such costs. It would certainly be a matter for regret if it were found that a person in quiet possession of land could be expropriated by the State, and could not get the price of his land except by taking legal proceedings and paying the costs. Such miscarriages of justice have happened here in earlier times by the oversight of the legislature; but when notice was attracted to them the law was put on a footing which effectually prevented their recurrence. Their Lordships are glad to find that the law of Lagos is not such as to prevent justice being done in this respect. By the Public Lands Ordinance, 1876, s. 7 (1), the Supreme Court has complete jurisdiction over the matters in dispute. By sect. 3 of the Petitions of Right Ordinance, 1877, all claims against the Government, being of the same nature as claims preferred against the Crown in England by Petition of Right, may, with the consent of the Governor, be preferred in the Supreme Court by a suit instituted against the proper officer. And by sect. 8 of the same Ordinance costs may be awarded in suits against the Government in the same manner as in suits between private parties. It was argued for the Colonial Secretary that the power of giving costs does not extend to proceedings which are not suits framed as required by the ordinary rules of civil procedure. The record is somewhat meagre as regards these proceedings; but it contains enough to enable their Lordships to dispose of this argument. The various documents are entitled as an ordinary litigation between plaintiff and defendant, the Colonial Secretary being the defendant; the proceeding is called a suit, is tried as a suit, and is brought to appeal as a suit. Therefore, in whatever form it

may have been commenced, whether it was regular or irregular, their Lordships have no hesitation in now holding it to be a suit against the Government for the purpose of recovering money due to the plaintiffs.

The Colonial Secretary should be charged with the costs of the action and appeal in the Colony. But, considering the part played by Davies, their Lordships think that he also should be charged jointly with the Colonial Secretary.

The respondents must pay the costs of these appeals.

Their Lordships will humbly advise Her Majesty in accordance with this opinion.

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CALLENDER, SYKES & Co. *v.* COLONIAL SECRETARY OF LAGOS AND DAVIES.

WILLIAMS *v.* DAVIES.

Solicitors for appellants: *Pĥelps, Sidgwick, & Biddle.*

Solicitors for respondent Davies: *Ashurst, Morris & Co.*

[PRIVY COUNCIL.]

MCLEOD . . . . . APPELLANT;

AND

MCNAB AND OTHERS . . . . . RESPONDENTS.

J. C.* 1891 *July* 16, 17.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, IN THE DOMINION OF CANADA.

Law of Nova Scotia—Wills—Codicils—Revocation—Revival.

Where by a codicil dated the 21st of July, 1882, expressed to be a codicil to his will of the 17th of July, 1880, the testator confirmed the said will, and it appeared that the said will consisted not merely of the document of the 17th of July, 1880, but also of an intermediate codicil revoking a particular bequest therein:—

Held, that though a reference simply to the date of the earlier document was not sufficient in itself to restrict the confirmation to that particular document, yet other words and surrounding circumstances could and did convey such an intention with reasonable certainty, and accordingly the will of the 17th of July after confirmation was no longer affected by the partial revocation made by the intermediate codicil.

APPEAL from an order of the Supreme Court (June 17, 1891), dismissing the appeal of the above appellant from a decree of the

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, and SIR RICHARD COUCH.

J. C. 1891 McLeod v. McNab.

Surrogate Judge of Probate for the county of Halifax, Nova Scotia, which sustained the will of Alexander McLeod, deceased, dated the 17th of July, 1880, and two codicils thereto dated the 21st of July, 1882, and the 16th of December, 1882, and confirmed the probate thereof to Bayne and McNab, which had been granted in common form to them as executors on the 24th of January, 1883.

It was objected on behalf of the appellant that the will and two codicils should not be admitted to probate on various grounds, including (1.) that the will of the 17th of July, 1880, had been revoked by another will dated the 17th of June, 1882; (2.) that till this June will was produced the codicil of the 21st of July, 1882, was inadmissible, being tendered as a first codicil which it could not be except to the June will; (3.) the December codicil could only be a second codicil to the June will, and there was nothing to shew what it was a codicil to.

The principal questions in the appeal were, (1.) Was the codicil of June 17, 1882, entitled to probate, or had it been revoked? (2.) Was the residuary bequest in the will of the 17th of July, 1880, in favour of Dalhousie College, revoked? (3.) If revoked by the codicil of the 17th of June, 1882, was it revived by that of the 21st of July, 1882.

The law relating to wills of real and personal estate in Nova Scotia is contained in c. 89 of the 5th series of the Revised Statutes of that province.

Lyons, Q.C. (of the Canadian bar), and *E. Pollock*, for the appellant, contended that the last will of Alexander McLeod consisted of the will of the 17th of July, 1880, as altered by the codicil of the 17th of June, 1882, which revoked the residuary gift to Dalhousie College. That codicil was never revoked or legally cancelled or destroyed. The confirmation expressed by the codicil of July, 1882, was of the last will, which the evidence shewed consisted of two documents, and not of one. Read together, there was no residuary bequest. Unless the confirmation related to one document, to the exclusion of the other, there was no revival of the residuary bequest, and the testator died intestate as regards his residue. Reference was made to sects. 4,

13, 14, 17, and 19 of the above-mentioned Act; also to *Sugden* v. *Lord St. Leonards* (1); *Brown* v. *Brown* (2); *Woodward* v. *Goulstone* (3); *Lord Walpole* v. *Lord Cholmondely* (4); *Crosbie* v. *McDoual* (5); *In the Goods of Steele* (6); *Green* v. *Tribe* (7); Taylor on Evidence (8th ed.), s. 1072.

Ross, Q.C. (of the Canadian bar), and *Deane*, for the respondents, were not called on.

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The judgment of their Lordships was delivered by

Lord Hannen:—

Their Lordships do not think it necessary to trouble the counsel for the respondents.

The facts of this case, so far as it is necessary to state them by way of introduction to the judgment of this Board, are these: The testator, Mr. Alexander McLeod, made his will on the 17th of July, 1880. That will contained a residuary bequest to Dalhousie College. The appellant is the executor of Archibald McLeod deceased, who was the only surviving brother and heir-at-law of the testator, and would be entitled to any estate not disposed of by the testator. He says that the residuary bequest to Dalhousie College was revoked by a codicil of the 17th of June, 1882. For the present purpose their Lordships assume that this codicil did contain a revocation of the residuary bequest; although undoubtedly, as pointed out by the learned judges in the Court below, the terms of that revocation are unknown, and it does not appear whether it was by express words of revocation, or by the substitution of some other gift in its place. Assuming there was such a revocation, the testator, on the 21st of July, 1882, made another codicil, expressed to be a codicil to his will of the 17th of July, 1880. By that codicil he confirms the will of the 17th of July, 1880, in every other particular than as altered by that codicil. The question is whether

(1) 1 P. D. 154.
(2) 8 E. & B. 876.
(3) 11 App. Cas. 469.
(4) 7 T. R. 138.
(5) 4 Ves. 610.
(6) Law Rep. 1 P. & D. 575.
(7) 9 Ch. D. 231.

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that has the effect of reviving the residuary bequest which was contained in the original will of 1880.

Now the language of the statute which regulates these matters in the Colony as well as in this country, so far as it is necessary in this case to state it, is this: "No will or codicil shall be revived otherwise than by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same." It has been decided in many cases that the intention must be found in the instrument itself; and it may be taken that the recent decisions have established that a mere reference to the document intended to be dealt with, whether will or codicil, by its date, is not sufficient in itself. The date is an important element in the consideration, but it is not to be taken by itself; it becomes necessary to look to the context, and to anything else in the document which may explain whether the intention of the testator was to confine the action of the testamentary disposition under consideration to the document of that date, or to extend it to something more.

Their Lordships are of opinion that when the codicil of the 21st of July, 1882, is examined, with the assistance of those circumstances in which the testator was placed at the time, which they are entitled to consider, it does appear that this is not merely a reference to the document of the 17th of July, 1880, by its date, but by other words, which appear clearly to indicate that it was that document by itself which was in the contemplation of the testator. According to the exposition of the law by Sir James Wilde in the case of *In the Goods of Steele* (1), which has been acted upon ever since, "the Court ought always to receive such evidence of the surrounding circumstances as, by placing it in the position of the testator, will the better enable it to read the true sense of the words he has used. This is a doctrine constantly acted upon at common law in relation to written documents, and notably in cases of written guarantee." Among the pertinent circumstances that may be looked to must be included the known contents of the codicil of the 17th of June, 1882. We have these from the evidence of Mr. Shannon. By the will of the 17th of July, 1880, Mr. Thompson was ap-

(1) Law Rep. 1 P. & D. 575.

pointed executor, but, by the codicil of the 17th of June, 1882, the appointment of Mr. Thompson was cancelled, and Mr. McNab was appointed in his place. When, therefore, in the codicil of the 21st of July, 1882, the testator says, "Whereas I have in my said will nominated and appointed Philip Thompson, of the city of Halifax, assistant city treasurer, to be one of my executors, now I do hereby cancel the said appointment, and I do hereby appoint in lieu of the said Philip Thompson my friend John McNab, of the said city of Halifax, merchant, as one of my executors, who with my friends Thomas Bayne and James McDonald, in the said will named, are to be the executors of my said will, and of this my codicil thereto," it is obvious that he could not be referring to the will, which it is contended on behalf of the appellant was then in existence, consisting not only of the document of the 17th of June, 1880, but of the codicil of the 17th of June, 1882; because looking at the will so constituted, it was not the fact that the testator had appointed Mr. Thompson, but he had appointed Mr. McNab. This appears to their Lordships to lead inevitably to the conclusion that when the testator in that part of the codicil of the 21st of July, 1882, is speaking of his will, he is referring only to the document of the 17th of July, 1880; and that therefore, in the language of Sir James Wilde in the case above referred to, their Lordships do find in the instrument under consideration "expressions conveying to the mind of the Court, with reasonable certainty, the existence of the intention in question," namely, to deal with the will of 1880, not in combination with, but as distinct from, the codicil of the 17th of June, 1882. There are other minor points contained in the codicil of the 21st of July, 1882, in connection with the codicil of the 17th of June, 1882, which it is not necessary in their Lordships' view to say more of than this, that they all point in the same direction.

An argument has been addressed to their Lordships that the mere statement that the testator confirms the will of 1880 is not sufficient, without any express statement that the testator revokes the revocation of the residuary bequest. Their Lordships are of opinion that if the meaning be, as they consider it is, that he confirms the will of the 17th of July, 1880, in its terms, that is

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in itself a restoration of the residuary bequest contained in it; and their Lordships are also of opinion that the word "confirm" is an apt word, and expresses the meaning, and has the operation of the word "revive," which is used in the statute.

For these reasons their Lordships will humbly advise Her Majesty to approve the judgment of the Supreme Court and dismiss the appeal. The appellant must pay the costs of the appeal.

Solicitors for appellant: *Angell, Imbert-Terry, & Page.*
Solicitors for respondents: *Bompas, Bischoff, & Co.*

[PRIVY COUNCIL.]

J. C.* 1891 *June* 9; *July* 25.

COMMISSIONER OF STAMPS . . . . APPELLANT;

AND

HOPE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Considered. BARCLAYS BANK *v.* BECK [1952] 1 Q.B. 47

Considered. BARCLAYS BANK *v.* BECK [1952] 2 Q.B. 47

Law of New South Wales—Stamp Duties Acts—Probate—Locality of Debt—Probate Duty.

In order that an asset may be liable to probate duty under the Stamp Duties Acts it must be such as the grant of probate confers the right to administer, and therefore one which exists within the local area of the probate jurisdiction.

Blackwood v. *The Queen* (8 App. Cas. 82) followed.

Though a debt has no absolute local existence, yet it is a well-settled rule that it possesses an attribute of locality—a simple contract debt being within the area of the local jurisdiction within which the debtor for the time being resides, the locality of a specialty debt being where the specialty is found at the time of the creditor's death.

Where a deed contained an express covenant to retire and pay promissory notes, and a proviso that the simple contract should not merge in the specialty:—

Held, that even if the remedies by simple contract to a certain extent were preserved, still there was but one debt, and that had become a debt by specialty.

Price v. *Moulton* (10 C. B. 561) considered.

APPEAL from an order of the Supreme Court (March 6, 1890), on a special case stated by the appellant under the Stamp Duties

* *Present*:—LORD FIELD, LORD HANNEN, and MR. SHAND (LORD SHAND).

Act of 1880, s. 16, and the Stamp Duties Act Amendment Act of 1886, s. 5.

The question submitted by the special case was whether stamp duty as assessed by the appellant was payable under the said Acts by the respondent as executrix of the will of George Hope, in respect of £75,727 due to the testator at his death under the circumstances stated in their Lordships' judgment.

The Court below held that the debt was a specialty debt although represented by promissory notes, and that as it was to be assumed that the mortgage deed was in the possession of George Hope in Victoria at the time of his death the debt was bona notabilia in Victoria, and not liable to probate duty imposed by any statute of New South Wales.

Sir *H. Davey*, Q.C., and *Vaughan Hawkins* (*Leverson*, with them), for the appellant, contended that the sums represented by the promissory notes were bona notabilia in New South Wales. George Hope died in the Colony of Victoria, where he was domiciled, leaving a will, which was proved in that Colony. But probate was also granted of the exemplification of the will by the Supreme Court of New South Wales, some of the testator's estate being situated in that Colony. And the promissory notes were payable by residents in New South Wales, though they were at the time of the testator's death deposited in a bank in Victoria for collection; and the mortgage was registered in the Colony of New South Wales. It was contended that the debt was a simple contract debt from persons resident in that Colony. The mortgage was only a collateral security for its due payment. It did not, under the circumstances, create a new specialty, nor did it operate as a merger of the debt due on the notes. The legal rights and remedies under the simple contract were not put an end to. In order that there may be a merger an intention to that effect must appear on the instrument, and both debt and remedy under the two contracts must be coextensive. Reference was made to Byles on Bills (14th ed.), p. 314; *Bedford* v. *Deakin* (1). Here the specialty debt is not coextensive with the original debt; for

(1) 2 B. & Ad. 210; S. C., 2 Stark. 178.

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it relates not to the full amount of the bills, but to the amount in respect of which they might be dishonoured: see Chitty on Contracts (12th ed.), p. 777; *Ansell* v. *Baker* (1); *Twopenny* v. *Young* (2); *Boaler* v. *Mayor* (3); *Price* v. *Moulton* (4); *Walker* v. *Jones* (5). Bills of exchange are bona notabilia where the debtor is: *Yeoman* v. *Bradshaw* (6). The locality of a specialty debt is where the specialty was at the death of the obligee, not where the obligor dwells: *King* v. *Sutton* (7).

Finlay, Q.C., and *Sutton*, for the respondent, contended that Stamp Duties Acts (44 Vict. No. 3, and 50 Vict. No. 10), apply only to property within the Colony of New South Wales, and recoverable by virtue of the probate granted in the Colony. By the Charter of Justice granted under 4 Geo. 4, c. 96, the Supreme Court of New South Wales could only grant probate relating to property within the Colony. The debt in this case was a specialty debt secured by the covenant in the mortgage deed and therefore was property in Victoria, where the deed was situated at the testator's death. Even as regards the notes, they were payable in Victoria. As regards merger, that is not material. If it were, it is not so dependent on the intention of the parties as has been contended for; on the contrary, it will operate contrary to their intention: see *Higgens's Case* (8); *Price* v. *Moulton* (4); *Saunders* v. *Milsome* (9). Whether or not the creditor still preserved any of his remedies by simple contract, the debt became a debt by specialty as soon as the mortgage deed was executed.

Sir *H. Davey*, replied.

1891 *July* 25.

The judgment of their Lordships was delivered by

LORD FIELD:—

The appeal in this case is from an order of the Supreme Court of New South Wales of the 6th of March, 1890, on a special

(1) 15 Q. B. 20.
(2) 3 B. & C. 208.
(3) 19 C. B. (N.S.) 76.
(4) 10 C. B. 561.
(5) Law Rep. 1 P. C. 50.
(6) 3 Salk. 70; and see Dyer, 305 (*a*), pl. 58.
(7) 1 Wm. Saund. 274.
(8) 6 Rep. 45.
(9) Law Rep. 2 Eq. 573.

case stated for the opinion of the Court, by which order the appellant was directed to repay to the respondent the sum of £4114, erroneously assessed upon and paid by her by way of probate duty, as executrix of the will of George Hope.

At the time of the testator's death he was resident and domiciled in the Colony of Victoria, but he died possessed of estate liable to probate duty within the jurisdiction of the Supreme Court of New South Wales, and it became necessary, therefore, for the respondent to clothe herself with probate from that Colony.

By the Royal Charter of Justice for New South Wales, the Supreme Court is authorized to grant probates of the last wills and testaments of the inhabitants of the Colony, limited, however, to such "money, goods, chattels, and effects as the deceased person shall be entitled to within that part of the said Colony within the Island of New Holland," and by various Stamp Duty Acts duties are authorized to be charged upon "all estates, whether real or personal, which belonged to any testator." It was also provided that the applicant for probate should lodge an affidavit and inventory setting forth an account of the estate of the deceased, with power to the Commissioner of Stamps for the Colony, if dissatisfied with the account so given, to cause a new account and inventory to be made, upon the footing of which he is to assess the duty, subject to a right of appeal, of which the present case is an exercise.

Under this Act the respondent accordingly furnished an inventory, in which she admitted assets within the Colony to the value of £26,114, but the appellant was dissatisfied with this account, and assessed the duty upon the footing of a new inventory, in which he charged the estate with duty upon the unpaid balance of certain promissory notes to the testator, which had been given to him under the following circumstances.

The testator, in the year 1882, was the owner of a station within the Colony of New South Wales called Beemery, which he in that year agreed to sell to Alfred Kirkpatrick and two other persons, the agreement being that the purchasers should pay to the testator the sum of £46,316 13*s.* 4*d.*, part of the purchase-money, in cash, and that the sum of £92,633 6*s.* 8*d.*, the

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balance, with interest, should be paid by twelve promissory notes, falling due at various dates, and the due payment of which should be secured by mortgage of the station.

The cash payment was accordingly made, and the notes set out in the inventory, and dated the 21st of July, 1882—the last of which was payable on the 24th of July, 1886 (after the testator's death)—were handed over, and possession of the station was given, and on the 12th of March, 1883, the purchasers executed the agreed mortgage by deed under seal. By this deed the station and effects were assigned to the testator, with the powers and provisions usual in the case of mortgage. The deed also contained a proviso for the execution of a release by the testator if the mortgagors duly retired and paid the promissory notes at maturity, the usual power of entry and sale in case of default, and in particular an express covenant by the mortgagors with the deceased "to retire and pay the said several promissory notes as and when the said several promissory notes respectively shall become due and payable according to the effect and tenor thereof respectively."

This deed, therefore, clearly created a debt by "specialty," in which, under ordinary circumstances and without any expression or implication of a contrary intention, the simple contract debts created by the promissory notes would have been merged. But such was not the intention of the parties, and accordingly the deed contained a proviso of great importance, that "no simple contract shall be considered as having merged in the specialty created by or contained in these presents, and that in any action upon any simple contract the defence that such simple contract was merged in or extinguished in any specialty created by or contained in these presents shall not be available or be used, and that no negotiable security or securities taken for or in respect of any moneys for the time being owing on the security of these presents shall in any way postpone or affect this security, or all or any of the powers or provisions hereof or hereby created." The latter part of the proviso was intended to meet a provision in the mortgage by which, if default was made in the payment of any of the promissory notes, the whole of the moneys thereby secured should become immediately due and payable, and an

analogous provision in the declaration of trusts of the proceeds of any sale made in the event of such default so to appropriate the proceeds. So that in such event the remedy under seal might, at the option of the deceased, at once be brought into operation for the whole remaining balance.

The testator died on the 25th of April, 1884. Such of the promissory notes as fell due during his lifetime had been duly paid, leaving the balance to become payable as the notes respectively should come to maturity. The testator, as before stated, resided within the Colony of Victoria at the time of his death, and had at that time the deed with him in that Colony; the debtors were resident in New South Wales; the promissory notes were held by a bank in Victoria. It was stated in the case, and apparently is the fact, that the respondent was assessed in the Colony of Victoria, and paid duty upon this debt; but the appellant insisted upon his right to charge the duty in New South Wales, and the respondent therefore paid the amount under protest, and subject to the decision of the Supreme Court upon a special case, which was agreed to between the parties, and in which the question was whether the balance of £75,727 15*s.* was liable to probate duty in New South Wales as assessed.

Upon the argument of the case it was correctly held by the Supreme Court, upon the authority of the case of *Blackwood* v. *Reg.* (1), decided by this Board, that the general words in the statute "personal estate" must be read as limited to such estate as the grant of probate confers jurisdiction to administer, and that the appellant therefore, in order to establish the liability he alleged, must make out that the asset is one existing within the local area of the limited jurisdiction created by the Act. Now a debt per se, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence; but it has been long established in the Courts of this country, and is a well-settled rule governing all questions as to which Court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by

(1) 8 App. Cas. 82.

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specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be bona notabilia within the area of the local jurisdiction within which he resided; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was bona notabilia where it was "conspicuous," i.e., within the jurisdiction within which the specialty was found at the time of death: see Wentworth on the Office of Executors, ed. 1763, pp. 45, 47, 60 (1).

This rule received an apt illustration in the comparatively modern case of *Gurney* v. *Rawlins* (2). In that case executors claimed to recover under a diocesan probate, and the subject-matter of their claim was a policy of insurance under seal, by which the capital stock of an insurance company was made chargeable with the amount assured. The defendants disputed the authority of the plaintiffs to recover under that probate, alleging that they were resident in London, and that the capital stock of the company was out of the diocese, so that a Prerogative Probate was essential; but the replication that the policy was within the diocese at the time of death was held good, on the ground that the debt was by specialty and so bona notabilia where it was found at the time of death.

The correctness and application of the rule were not disputed at their Lordships' bar; but it was contended on the part of the appellant that under the circumstances of this case the debt was one by simple contract. It was urged that in substance it was the balance of the purchase-money, or at the least that it was due by virtue of the promissory notes, and that it was part of the testator's estate in New South Wales, where the debtors resided at the time of death, and it was urged that the mortgage was under the circumstances of the case merely a collateral

(1) See also ed. 1829, p. 108.

(2) 2 M. & W. 87.

security, was never in fact acted upon, and was of no value. On the other side their Lordships were asked to hold that such was not the case, but that the taking of the mortgage under seal operated by act of law as a merger or satisfaction of the prior simple debt, and it was contended that such was the case notwithstanding the express contract of the parties to the contrary.

This contention was founded upon the authority of the case of *Price* v. *Moulton* (1), which was decided by judges of very great authority. That case, however, was decided upon special demurrer, and the pleadings, as observed by the Court, are far from clear. The pleading in answer to the indebitatus count certainly admitted that a subsequent contract under seal, identical with the parol contract pleaded to, had been entered into between the parties, and thus a good technical answer to the claim under the indebitatus count was undoubtedly set up. But the plaintiff sought to get rid of this technicality, not by setting out the deed which would have shewn its nature and specific terms, and whether it did or did not operate as a merger, but by an averment that it was made by way of security and so expressed; and it seems to their Lordships that the Court may well have considered that this mode of pleading did not deny that the terms of the deed in themselves effected the merger, but only asserted the intention of the parties that it was to be by way of collateral security only. The reported language of the Court in some places indeed seems to imply a larger and broader meaning; but, if that is to be understood as importing that a merger of a simple contract debt in a debt of a higher nature is effected by law, merely by the existence of an identical covenant, and notwithstanding the plain intention of the parties to the contrary, that is a proposition which their Lordships would hesitate to assent to.

It would appear to be contrary to other decided cases (*Twopenny* v. *Young* (2)), and the authorities collected and classified in 2 Fisher on Mortgages (3rd ed.), ss. 1328 to 1334. Indeed, in the subsequent case of *Boaler* v. *Mayor* (3), in the same Court,

(1) 10 C. B. 561.

(2) 3 B. & C. 208.

(3) 19 C. B. (N.S.) 76.

J. C. 1891 COMMISSIONER OF STAMPS v. HOPE.

one of the learned judges, who had been a party to and concurred in the judgment in *Price* v. *Moulton* (1), seems to have implied that the Court in the case of *Price* v. *Moulton* (1) had no intention of laying down any such general rule, and to have done so with the assent of the very learned counsel who had argued the case in the contrary sense.

But it does not seem to their Lordships to be necessary, for the decision of the case now before them, to come to any definite conclusion as to the effect which ought to be given to the case of *Price* v. *Moulton* (1). If merger is an implication of law so strong that it takes effect even against intention, then the simple contract in the present case was undoubtedly merged and extinguished, and the debt was no other than a debt by specialty. But upon the contrary supposition, that the effect of the proviso was to preserve the remedies by simple contract to the extent stipulated for, it appears to their Lordships that the debt was still a specialty debt. The deed contains an express covenant to retire and pay the promissory notes; between the same parties it was an existing security under seal, at the time of the testator's death, for the balance then due; it would continue to be a security for a much longer period, and would be attended with advantages not belonging to debt by simple contract. Although it never became necessary to act upon the deed by taking possession or seeking any remedy under it, it was and remained a registered deed under the system of Colonial registration, and of full force and validity. There is but one debt, whether in Victoria or New South Wales; and their Lordships fail to see how it can be said that that debt has not become a debt by specialty.

This is the conclusion at which the Supreme Court has arrived and their Lordships think it is correct; and they will therefore humbly advise Her Majesty that the order below should be affirmed.

The appellant must bear the costs of this appeal.

Solicitor for appellant: *Randolph C. Want.*

Solicitors for respondent: *Burton, Yeates, Hart, & Burton.*

(1) 10 C. B. 561.

[PRIVY COUNCIL.]

DAVIES AND ANOTHER . . . . . PLAINTIFFS;

AND

NATIONAL FIRE AND MARINE INSURANCE COMPANY OF NEW ZEALAND } DEFENDANTS.

AND CROSS APPEAL.

J. C.*
1891
June 3, 4; *July* 4.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Contract of Marine Insurance—Open Policy—Construction—Declaration of Goods by Insured—Onus Probandi.

Where payment of a risk is resisted by insurers on the ground of misrepresentation, the onus is on them to prove very clearly that such misrepresentation has been made.

Where an open policy was granted on goods shipped from Melbourne to London, per one set of specified steamers to Sydney and thence to London per another set, covering risk while in a specified factory at Sydney, "declarations to be made within forty-eight hours after departure of steamer from Sydney":—

Held, that according to the true construction of this contract two declarations must be made by the insured, one as incident to every contract of an open policy, for the purpose of identifying the shipments at Melbourne to which the policy was to attach and necessary by law to make the policy operative; the other, under the express terms of the above contract, giving particulars relating to such goods as had been already brought within the policy, by a previous declaration apt for that purpose, and had since been actually shipped for London.

Semble: Though there is no positive law in New South Wales requiring contracts of marine insurance to be in writing, yet the general authority given to the agent of an insurance company must be to make contracts in the ordinary way, and that is by writing.

CONSOLIDATED cross appeals from an order of the Supreme Court (May 31, 1889), making absolute a rule nisi to set aside a verdict in favour of the appellants.

The action was brought upon certain policies of insurance. There were three counts in the declaration: (1.) for loss by fire in

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, LORD FIELD, LORD HANNEN, MR. SHAND (LORD SHAND).

J. C. 1891 DAVIES v. NATIONAL FIRE AND MARINE INSURANCE COMPANY OF NEW ZEALAND.

respect of certain buildings, plant, and stock; (2.) loss by fire of certain merchandise under an open policy of marine insurance; (3.) the same loss under an oral agreement to the effect in the said count alleged.

A verdict for £2134 on the two latter counts was set aside, and a verdict for £887 on the first was allowed to stand.

The proceedings in the suit are stated in the judgment of their Lordships.

Finlay, Q.C., and *Walton*, for the appellants, submitted that the order so far as it related to the second and third counts was wrong and ought to be reversed. In order that risk should attach under the open policy sued upon it was not necessary according to its true construction that a declaration should have been previously made. By its express terms no declaration was required until after the merchandise had been shipped from Sydney. It was within the terms of the contract that the declaration should be made after the loss. The assured had the option of so doing under the express terms of the contract. Nor was it a condition of the policy that the premium should be paid before loss.

On the evidence it appeared that at the time of the fire the merchandise lost was duly insured and covered by the policy mentioned in the second count and the agreement mentioned in the third. As regards the evidence relating to an oral agreement, it at least established a waiver by the authorized manager of the company of the strict requirements of the written contract, and shewed that it was inequitable for the company to insist on those requirements.

Reference was made to Phillips on Insurance (5th ed.) §§ 438–9; *Crowley* v. *Cohen* (1); *Stephens* v. *Australasian Insurance Company* (2); *Imperial Marine Insurance Company* v. *Fire Insurance Corporation* (3); *Harman* v. *Kingston* (4); *Bhugwandass* v. *Netherlands India Sea and Fire Insurance Company* (5); *Gledstanes* v. *Royal Exchange Assurance* (6); *Ionides* v. *Pacific Insurance Company* (7).

(1) 3 B. & Ad. 478.
(2) Law Rep. 8 C. P. 18.
(3) 4 C. P. D. 166.
(4) 3 Camp. 150.
(5) 14 App. Cas. 83.
(6) 5 B. & S. 797, 809.
(7) Law Rep. 6 Q. B. 674; Law Rep. 7 Q. B. 517.

Barnes, Q.C., and *Wills*, for the respondent, contended that the risk did not attach under the open policy to the goods which had been lost until they had been declared, and that no declaration earmarking them as goods to which the policy applied had been made. With regard to the provision "declaration to be made within forty-eight hours after departure of steamer from Sydney," in the policy, that did not dispense and was not intended to dispense with declarations in the usual course upon the shipments at Melbourne. The appellants were bound by the ordinary law of insurance, and as an incident to their contract independently of the above express stipulation which must be so construed as not to overrule the essential law relating to open policies, to declare before loss. They had not done so, nor had they paid the premium. Moreover, the merchandise said to be covered by the policy was not forwarded from Sydney by the first available steamer or within a reasonable time after its arrival at Sydney.

The policy in this case was not intended to give the appellants the option claimed, viz., to wait till the loss occurred before they declared to which goods the policy should apply. It was an ordinary marine policy, merely interpolating a condition that the goods to which it applied should remain insured whilst being transhipped at Sydney and whilst in warehouse for that purpose. Reference was made to Arnould on Insurance (4th ed.), pp. 218–301, and to the cases cited on the other side, especially to *Harman* v. *Kingston* (1); *Imperial Marine Insurance Company* v. *Fire Insurance Corporation* (2). With reference to the cross appeal it was contended that, on the evidence, the misrepresentations relied on were fully made out and that they vitiated the policies, including the one mentioned in the first count, on which the appellants had maintained their verdict.

Finlay, Q.C., replied in the original appeal, but was not heard in cross appeal.

1891
July 4.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The appellants in the original appeal are plaintiffs in the Court below, and respondents in the cross appeal; and the

(1) 3 Camp. 150. (2) 4 C. P. D. 166.

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appellants in the cross appeal are defendants in the Court below, and respondents in the original appeal. The plaintiffs sued on two policies of insurance, one dated the 26th of July, 1887, against loss by fire on a butterine factory and its contents, the other dated the 24th of August, 1887, a marine policy on goods, but covering risks occurring to them when within the factory aforesaid. The fire occurred in October, 1887.

The declaration, which was filed on the 7th of March, 1888, comprises three counts. The first is on the fire policy. The second is on the marine policy, alleging that the goods insured were destroyed by fire when in the factory. The third alleges a parol agreement for a policy to the same effect with the marine policy, but with a special term imported into it.

The pleas filed by the defendants raise several defences. It will be convenient first to consider those which relate to the first count, or the fire policy. As to that, the defendants allege that it was obtained upon a proposal of the plaintiffs, which contained two untrue statements. One was that the risk then proposed had not been declined by any other insurance office; and the other, that the plaintiffs had never, nor had either of them, been claimants on a fire insurance company. They further allege that the plaintiffs did not after the fire give such notice or accounts as by the policy they were required to do.

The written proposal for the policy was signed by the plaintiff Davies, with the name of the firm, Charles Davies & Co. It is on a printed form, with the necessary spaces for handwriting. Two questions were printed on the form, as follows: "Has risk been declined by any other office?" "Has proponent ever been a claimant on a fire insurance company—if so, state when and name of office?" To each of these the answer "No" was written. The writing of these answers, as of all the other particulars, was that of an insurance agent named Robey, who however was acting on the information and instruction of Davies. In answer to special questions, the jury found that Davies did not state the two negatives which the proposal contains, and they gave the plaintiffs a verdict for the sum of £887 3*s.* 2*d.* On a motion for new trial, the Court gave judgment on the footing that the

answers were those of Davies; as indeed it is clear on the evidence that they were. But the question still remains whether the answers were untrue.

It appears from the evidence that about the end of July or the beginning of August, 1887, Davies called at the office of the Commercial Union Company, and asked Irwin, a clerk of the company, to fill up a proposal for insurance of the factory in question against fire. Davies signed the proposal, and Irwin handed it to Sheridan, an inspector employed by the Commercial Company. Sheridan tells us that he gave it to Wandsey, another clerk. He then says: "I considered the matter with Mr. Welch, the manager. We declined it." He then handed back the proposal to Wandsey. Wandsey says that he was head clerk in August. He remembers receiving the proposal from Sheridan, and says it was put by some one in the proposal drawer, and when searched for it could not be found. Davies says that he initiated a treaty with the Commercial Company, and gave them authority to view the building, "But the matter went no further, so far as I know; I never followed it up." Nobody suggests that any communication was made by the company to Davies to shew they had declined the risk.

The learned judges below thought that this evidence shewed that the risk had been in fact declined by the Commercial Company; and then they differed in opinion, two holding that the answer was not untrue, because Davies had not been informed that the risk had been declined; and the third holding that it was untrue in fact, and that the ignorance of Davies made no difference. But as regards the fire policy, it is clear that when it was effected Davies's proposal to the Commercial Company had not been made. Irwin puts it at the end of July or beginning of August, and Wandsey puts it in August. The date of the fire policy is the 26th of July. It was not necessary for the Court below, nor is it for their Lordships, to decide this question of fact as to the marine policy. But they think it right to say that when the payment of a risk is resisted on the ground of misrepresentation, it ought to be made very clear that there has been such misrepresentation, and that it is not clear that a proposal, of which all that the witnesses shew is that it was made

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probably in August, and that it was declined, was declined before the 24th of August.

With regard to the second answer, the defendants relied on certain claims made by Phillips against other companies at a time anterior to his partnership with Davies. The jury found that he did not make those claims in his own interest. That finding is difficult to support; and the Court, on the motion for new trial, proceeded on the assumption that it was wrong. But they held that the "proponent" was Charles Davies & Co., and that the claims made by Phillips, when not a member of that firm, were not covered by the question, and therefore the answer was not untrue. Their Lordships concur in this view.

With respect to the insufficiency of notice and other information after the fire, the defendants have not shewn or alleged that, in point of fact, anything material has been withheld from them. But the communications to them were made by Charles Davies, writing for the firm Charles Davies & Co., and because the policy requires that they should be made by "the insured," the defendants contend that notice and other information given by only one of the insured is insufficient. Their Lordships think with the Court below that there is no ground for such a contention. They are indeed not clear that notice by the insured was not given according to the most strict and literal construction of the words. But whether it was so or not, they hold that notice on behalf of the insured by their agent is notice by the insured within the meaning of the contract.

The Court below refused to disturb the verdict of the jury on the fire policy, and as their Lordships agree with them, the cross appeal which relates to that policy must be dismissed.

The foregoing defences to the claim on the fire policy were also put forward against the marine policy, and no more need be said about them. To understand the further defences on the marine policy, it is necessary to look at the precise terms of the document. The risk insured against is thus described:—

"Whether lost or not, at and from Melbourne to Sydney per W. Howard Smith & Co.'s steamers, thence to London viâ all

ports per P. and O. or Orient mail steamers, in the sum of £ open amount, but not exceeding £3000 in any one bottom upon merchandise, covering risk while in Messrs. Charles Davies & Co.'s factory, Sydney. Declarations to be made within forty-eight hours after departure of steamer from Sydney. To cover all declarations made up to the 28th of February, 1888, valued for the purpose of this assurance at £ as above, say , in the good ship or vessel called the , as above, whereof is master (or whoever else, with the approval of the said company when practicable, shall or may be master), beginning the adventure upon the aforesaid interest from the loading thereof on board the said vessel at as aforesaid, and continuing during the time or voyage as aforesaid until landed, including risk of craft to and from the ship."

The premium to be paid is 20*s.* per cent. net.

Some of these expressions are applicable only to a valued policy, probably because a common form was carelessly used; but it is clear that the document forms what is called an open policy, and that some further act is to be done by the insured before the policy can apply to any particular risk. Their Lordships take a passage from the judgment of Lord Blackburn in *Ionides* v. *Pacific Insurance Company* (1), as stating well the nature of that necessary act:—

"The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description, if any there be, in the policy, on the voyage specified in the policy, to which the assured elects to apply the policy. The object of the declaration is to earmark and identify the particular adventure to which the assured elects to apply the policy. The assent of the assurer is not required to this, for he has no option to reject any vessel which the assured may select, nor is it necessary that the declaration should do more than identify the adventure, and so prevent the possible dishonesty of a party insured, who might intend to apply the policy to particular goods, so that they should be at the risk of the assurers, and he should come on them if there was a loss;

(1) Law Rep. 6 Q. B. 682.

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and then when those goods had arrived safely, to pretend that he intended to apply the policy to another set of goods still subject to risks."

Their Lordships adopt these views as applicable to the facts of this case, which they proceed to examine.

It is first material to ascertain the nature of the plaintiffs' business. It has a very short history, at least so far as the partnership is concerned, for it only commenced in June, 1887; it was practically destroyed by the fire in October, and the partnership was dissolved in March, 1888. At the date of the insurance, however, the plaintiffs had a factory at Drummoyne, near Sydney where the plaintiff Davies resided and superintended the business. At that factory the plaintiffs made butterine for sale in Sydney where they had a retail shop, and for exportation to London. They had also a factory in Melbourne, where the plaintiff Phillips resided and superintended the business. From the Melbourne factory they carried butterine by sea to Sydney, where, at least, if intended for exportation to London, it was reworked at the Drummoyne factory.

It was stated at the bar that the bulk of the plaintiffs' business consisted of export to London, and that in fact the sales in Sydney were quite insignificant, so much so as to be left out of account in considering the contract of insurance. But there is nothing in the evidence to shew in what proportions the product was sold from the factory, or was made up into pats and sold from the retail shop, or was shipped for London. The only tangible evidence on this point relates to three shipments from Melbourne to Sydney, one of five kegs by the *Gambier*, another of ten kegs by the *Cheviot*, and the third of eighty kegs by the *Gambier*. Of these ninety-five kegs thirty-five were sold by retail in pats, fifty-seven were shipped for London, and three were lost in the reworking. It is not stated whether the ninety-five kegs were, when shipped at Melbourne, destined for exportation or for sale in Sydney. But Kemp, the Sydney manager, states that, in calculating the amount of duty paid in Sydney, he did not include the lots of five and ten kegs, adding, "I have only calculated the larger ones that were intended for export." From which it is to be inferred that he considered the

eighty kegs as intended for export, though only fifty-seven were in fact exported.

All the other shipments from Melbourne, about 560 kegs, were in the factory at the time of the fire and were capable of export to London. But they were also capable of sale in Sydney. No declaration about them had been made to the Defendants, no premium had been paid, no act had been done to earmark or identify any portion of them as goods to which the insured had elected to apply the policy; even now the plaintiffs cannot shew that they had done anything in their own business to appropriate any part of the destroyed goods to the London market.

Their first answer to this difficulty is, that by the express terms of their written contract they were to make no declarations until forty-eight hours after the departure of each steamer from Sydney. But it is obvious that such declarations would not meet the requirements of the case. The risk insured against is from Melbourne to London, viâ Sydney, by certain ships, and including detention and transhipment at Sydney. But, as we have seen, any part of the goods might be detained in Sydney. If then no declaration is to be made of the election of the insured to apply the policy to goods shipped at Melbourne, and if loss occurs on the voyage to Sydney or in Sydney itself, what security have the insurers that they may not be charged with the value of goods never intended for London at all? It can hardly be doubted that if the lot of eighty kegs, of which mention has been made, had been destroyed in the factory, the plaintiffs would have claimed for its value, and yet there were only fifty-seven kegs which, accordiug to the actual dealings of the plaintiffs, could properly fall within the policy.

The declaration expressed in the policy could not by any possibility be made if a loss happened between the shipment at Melbourne and that at Sydney, probably the most perilous part of the whole risk. It seems an absurd thing to stipulate only for such declarations as in half the cases of loss or more could not be made. On the other hand, in such a case as this, it is quite reasonable to require two declarations. One, far the most important one, would earmark the shipments at Melbourne to which the policy was to attach, and would be accompanied by

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payment of a premium. This is the ordinary declaration incident to the ordinary contract of an open policy, and necessary to make it operative. The other would enable the insurers to know how much of the goods was actually shipped for London, that they travelled by the stipulated class of ship, with the names of the ships and other particulars which, for the purpose of reinsurance or otherwise, would be valuable to them. Such a declaration would not be required by law as the ordinary incident of the contract, and would be the proper subject of an express stipulation. Such a stipulation their Lordships think is made, in very curt and imperfect terms it is true, but such as are not uncommon in mercantile contracts. They find nothing in the letter of the contract to dispense with declarations on the Melbourne shipments; and the spirit of the contract, in their judgment, requires that such declarations should be made to support a claim under the policy. The further declarations after the departure of steamers from Sydney are to be made in the cases where they can be made, viz., where goods already brought within the policy are actually shipped for London.

It will now be convenient to examine the case made by the plaintiffs on their third count. That count runs as follows:—

"3. And the plaintiffs also sue the defendants for that the plaintiffs were desirous of insuring from time to time different parcels of merchandise of the plaintiffs against perils of the seas whilst in transit from Melbourne to Sydney, and against loss by fire whilst in the plaintiffs' factory in Sydney, and further against perils of the seas whilst in transit from Sydney to London; and the defendants knowing the premises proposed to become insurers to the plaintiffs of the said merchandise against the said risks by an open policy in the terms in the second count set forth, and it was thereupon agreed by and between the plaintiffs and the defendants that, in consideration that the plaintiffs would accept the said open policy in the form as set forth in the said second count, the defendants should make good to the plaintiffs any loss sustained through any of the said risks so intended to be insured against during the currency of the said policy, although such loss should happen before the time appointed for making declarations

under the said policy, and although by reason of the loss or destruction of the said merchandise before shipment for London it might be impossible to declare as required thereunder. And the plaintiffs say that they accordingly accepted the said open policy in the said form, and from time to time declared thereunder, in respect of certain portions of the said merchandise after shipment in Sydney for London."

The plaintiffs then allege the destruction of the goods, and the other circumstances necessary to support their claim.

The defendants deny the contract so alleged, and they contend that it is nothing but the written contract over again, only with the plaintiffs' construction imported into it. The plaintiffs, however, do not shew in this count what declarations they contracted to make, and though they allege that they did from time to time declare under the parol contract, they have proved no declaration at all. It is remarkable indeed that in the one case in which, according to their theory, they would be bound to make a declaration, viz., the shipment of fifty-seven kegs to London by the *Lusitania*, they made none, but effected a separate policy with some other insurer.

The evidence by which the plaintiffs seek to establish the parol contract is that of the plaintiff Phillips, who relates a conversation which he says took place on the 22nd or 23rd of August between himself, Robey, the insurance agent, and Mr. Gibb, the manager of the defendant's office. His account is as follows:—

"Robey took me to the office of Mr. Gibb. Robey says to Gibb, 'Mr. Phillips does not understand this open policy. He does not understand how it is he does not pay us the premium now.' Robey had with him a proposal form. Mr. Gibb said, 'Oh, that's all right; you pay us the premium when the goods leave for London, and then you pay us the 1 per cent., which covers the whole risk. We are charging you 7*s.* 6*d.* per cent. from Melbourne to Sydney, 2*s.* 6*d.* while in company's (Davies & Co.'s) store, and 10*s.* thence to London.' I said, 'I suppose you're right, but I can't understand the whole thing.' He said, 'Never mind, if you have any loss while the goods are in transition, my company will make it all right.'

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"(Mr. Salomons, Q.C., objects to any statement made by Gibb. Evidence proceeds, the power of attorney to be produced.)

"I said, 'How about the declarations—shall I post them over from Melbourne?' He said, 'No, you need not make the declarations until the goods leave Sydney for London.'"

The jury gave the plaintiffs a verdict on the third count as well as on the second; but leave was reserved to enter a non-suit, or a verdict for the defendants, on those counts. That has been done by the Court below. The learned judges considered that, though there is no positive law in New South Wales requiring contracts of marine insurance to be in writing, the general authority given to the agent of an Insurance Corporation must be to make contracts in the ordinary way, and that is by writing. Their Lordships do not dissent from this view, but they consider that the plaintiffs' theory of an entirely separate parol contract fails because of the fact that the parol contract alleged is prior in date to the written contract actually made; and they prefer to rest their judgment on the ground that the parties intended only one contract, which was written.

Their Lordships would not have thought it necessary to enter into this matter with so much particularity if it had not been for the use which the plaintiffs now seek to make of the conversation with Gibb. They contend that though they may not be able to maintain the separate contract alleged in the third count, yet the conversation with Gibb amounts to an indulgence by him in point of time, or a relaxation or waiver of the strict requirements of the written contract, which must fall within the authority of a manager, and which makes it unjust for the defendants now to insist on the rigidity of the written contract. They point out that Gibb was not called in answer to Phillips, and infer that it was because he could not materially qualify what Phillips said. Without examining closely what power a manager for an insurance corporation may have to dispense with particular obligations arising under a written contract, their Lordships think that the plaintiffs' contention ought not to prevail, for the following reasons.

First, there is the same difficulty about dates. After the conversation, the written contract is made. The difficulty does

not come in quite so stringent and conclusive a shape as when it is applied to the theory of two wholly separate contracts. And it is true that the term dispensed with is not an express term, but an unexpressed incident of the written contract. But it is an incident of extreme importance, because it is necessary to connect the policy with the goods insured, and without it the insurer is left at the mercy of the insured. And it is very difficult to hold that when the parties came on the following day to make their written contract, they should not have inserted an express dispensation to the insured from the obligation of earmarking their goods at Melbourne, if that was what they really intended.

That difficulty invites a close examination of what was actually said. It is to be observed that what Phillips did not understand was why the premium was not paid "now." Of course it could not be, because at the moment of making the policy no goods were specified. So Gibb explains that the premium is to be paid "when the goods leave for London." Leave what place? The subsequent expressions both of Gibb and of Phillips shew that the place spoken of was Melbourne, where the risk was to begin. Phillips then asks about the declarations. Are they to be posted from Melbourne? And the answer is that they need not be made till the goods leave Sydney. Therefore, as the conversation stands in evidence, the result is that the premiums are to be paid on shipment of goods at Melbourne, and that declarations need not be made till they leave Sydney. There is a certain obscurity about this. But the plaintiffs are contending that they were not bound to do any act whatever for the purpose of bringing goods under the policy during the whole time of their voyage to Sydney, and of their detention and reworking in Sydney. Unless they can prove that, they prove nothing that can benefit them. And the conversation with Gibb is far from proving that.

To these considerations must be added the danger of allowing evidence to be used here for a purpose for which it was not used at the trial, or on the motion for a new trial. Gibb was not called; but he might have been if it had been alleged that he had waived a term of the written contract. Why he was not

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called is plain from the position taken by the defendants' counsel. It was because the conversation with him was put in to prove the third count. Mr. Salomons objected to any evidence of a separate parol contract. It might have been more prudent to call Gibb; it also might have been more prudent to decline to embarrass the case with wrangles about conversations which the counsel was confident he could get rid of on legal grounds. Of that their Lordships do not affect to judge. But they think that an entirely new use here of evidence which, if used in the same way at the trial, or on the motion for new trial, might have called for further explanation and evidence, is more likely to lead to a wrong judgment than a right one.

The result is that the order of the Court below will stand affirmed, and the original appeal be dismissed. As both appeals are dismissed, each party must bear their own costs. Their Lordships will humbly advise Her Majesty accordingly.

Solicitors for the appellants: *Spyers & Son.*
Solicitor for the respondent company: *G. P. Slade.*

[HOUSE OF LORDS.]

H. L. (E.)
1891
July 23.

LITTLE AND OTHERS, OWNERS OF THE "APOLLO" . . . . . } APPELLANTS;

AND

THE PORT TALBOT COMPANY . . . RESPONDENTS.

THE "APOLLO."

Ship—Negligence—Harbour—Dock—Harbour-master, Authority of to bind Owners—Permissive use of Lock for grounding.

A ship entered a dock to load. While crossing the dock her propeller got foul of a rope so that the shaft was jammed and the engines could not be worked. There being no dry dock the ship was with the assent of the harbour-master put into a lock which served as the entrance to the dock in order that the water might be drawn off and the propeller cleared, the harbour-master representing to the captain of the ship that the bottom of the lock was level and that the ship might safely ground there. When the ship took the ground, being then heavily laden, she sustained serious injury owing to the existence of a sill which projected several inches above the level of the bottom across the middle of the lock. The dock was regulated by statute which empowered the owners to take tolls for ships entering the dock, and required persons in command of vessels within the dock to place them as the harbour-master should direct, under penalties. Vessels had on previous occasions been grounded in the lock under similar circumstances. The owners of the ship having brought an action against the dock owners to recover damages for the injury to the ship:—

Held, reversing the decision of the Court of Appeal (Lords Bramwell and Morris dissenting), that the harbour-master in informing the captain of the ship where she might safely ground and in permitting the ship to use the lock for the above purpose was acting within the scope of his authority; that he was guilty of a breach of duty in giving that permission and making the representations he did, when he knew—or ought to have known—of the existence of the sill; and that the dock owners were liable to the owners of the ship for damages for the injury:

Held, by Lords Bramwell and Morris, that the harbour-master had authority to permit the ship to use the lock for the purpose for which she used it, but that he had no authority to undertake that the lock was safe or to undertake any duty of care; nor did he in fact so undertake; that the captain took the ship into the lock not of right but only under a license and at his own risk, the use of the lock being for an abnormal and extraordinary purpose; and that the dock owners were not liable.

APPEAL from a decision of the Court of Appeal under the following circumstances:—

In December 1887 the *Apollo*, a screw steamship belonging to

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the appellants partly laden with cargo, entered the Port Talbot Harbour and Dock in Glamorganshire in order to complete her cargo. While proceeding across the dock to a loading berth her propeller got foul of a rope so that the shaft was jammed and the engines could not be worked. She was hauled up to her berth where she took in more cargo. A diver attempted to clear the propeller but found it impossible. Communications then took place between the captain of the *Apollo* and a man named Johns who during the illness of the harbour-master was acting as harbour-master. Johns suggested that in order to examine and clear the propeller the *Apollo* should be grounded in the lock which served as the entrance to the dock, there being no dry dock. In answer to questions put by the captain of the *Apollo* Johns assured him that the bottom of the lock was level and that there would be no damage to the vessel. He also added that a vessel called the *Gogo* had been grounded there shortly before under similar circumstances. As a matter of fact the lock had previously been used on several occasions for vessels to take the ground. The *Apollo* having entered the lock and some feet of water having been drawn off she took the ground with the result that her keel was broken and her bottom strained owing to the existence of a sill which projected several inches above the level of the bottom across the middle of the lock. The harbour and dock belong to the respondents, who are incorporated by statute. The use of the harbour and dock is regulated by 4 Wm. 4, c. xliii. and 6 Wm. 4, c. xcviii.

Sect. 51 of the earlier Act enacts "That it shall be lawful for any person appointed in pursuance of this Act to act as harbour-master within the said port and harbour, to direct any person having the command of any vessel entering into or being within the said port and harbour to moor, anchor, and place the same in such situation within the said port and harbour as the said harbour-master shall direct; and in case the master of such vessel shall refuse or neglect to remove the same as soon as may be after being required, and to moor, anchor, and place the same as the said harbour-master shall direct, he shall for every such offence forfeit and pay any sum not exceeding ten pounds; and

it shall be lawful for the said harbour-master and such other persons as he shall call to his assistance to remove or cause to be removed the said vessel in such manner as he shall deem necessary; and such master shall pay all the charges and expenses attending the removing such vessel after such direction, refusal, or neglect as aforesaid, such charges and expenses to be recovered in manner herein directed with respect to the recovery of penalties and forfeitures; and if any person shall prevent or impede the removal of any such vessel, such person shall forfeit and pay any sum not exceeding ten pounds."

Sect. 58 of the earlier Act, amended by sects. 19 & 20 of the later Act, empowers the company to demand and receive sums not exceeding the several rates thereinafter mentioned for every ship or vessel, except as thereinafter mentioned, entering the port and harbour.

In respect of the injury thus caused the appellants brought an action in the Queen's Bench Division against the respondents claiming damages on the ground of negligence in the construction of the lock, in permitting the *Apollo* to ground there, and in the representations of the defendants and their servants, and alternatively on the ground of a breach of a contract to take due and reasonable care of the vessel while in the dock and lock. The action having been transferred to the Admiralty Division was tried before Butt J., assisted by nautical assessors. There was a conflict of evidence upon several points, the details of which are discussed in the judgments in this House. The learned judges in the Courts below differed as to the effect of the evidence. The statement of facts given above represents the view of the evidence taken by the majority of their Lordships in this House. Butt J. pronounced against the plaintiffs' claim and dismissed the action, being of opinion that Johns had no authority to bind the defendants by what he was alleged to have said and done; that he did not make the representations above stated, but that if he did there was contributory negligence in the captain of the *Apollo*. The Court of Appeal (Fry and Lopes L.JJ., Lord Esher M.R. dissenting) affirmed that decision on the ground that what took place between the persons representing the ship and the persons representing the harbour

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was a mere license to use the lock at the risk of the captain of the ship for an abnormal and extraordinary purpose.

The appeal was twice argued; first on the 27th and 29th of January 1891 before Lords Herschell, Bramwell, Macnaghten, and Morris, by Sir *H. James* Q.C. and *Gorell Barnes* Q.C. (*Synnott* with them) for the appellants, and Sir *R. Webster* A.G. and *Bucknill* Q.C. (*C. C. Macrae* with them) for the respondents; secondly on the 23rd of June before Lord Halsbury L.C. and Lords Watson, Bramwell, Herschell, Macnaghten, and Morris by one counsel of a side.

June 23. Sir *H. James* Q.C. (*Gorell Barnes* Q.C. and *Synnott* with him), for the appellants:—

The true facts are that Johns was acting as and had all the powers and authority of the harbour-master: that he suggested or permitted—it matters not which—that the *Apollo* being disabled should be grounded in the lock in order that the damage might be examined and repaired; that Johns represented to the captain of the *Apollo* that the bottom of the lock was level and fit for her to ground on; that Johns knew or ought to have known that the sill existed and that it was therefore not safe for a vessel of the length of the *Apollo* and so loaded to ground there; and that the captain of the ship was not guilty of contributory negligence. It follows that the owners of the dock are responsible for the acts of their servant, acting as he was within the scope of his authority. Here is a ship using the dock and paying tolls; a disaster happens which makes it necessary for the ship to be grounded; if she had gone out of the harbour she would have been helpless. Neither could she remain in the dock to be an obstruction to other vessels. Under such circumstances and there being no dry dock it is not an abnormal or extraordinary use of the dock to permit the vessel to ground in the lock for the purpose of examination and repair. By the statutes regulating the dock the harbour-master has power to place or direct a vessel to go where he thinks proper, and penalties are imposed on vessels who disobey the harbour-master's directions and who obstruct or improperly use the dock. The captain of the

Apollo clearly could not have grounded in the lock—or put his vessel anywhere—without the harbour-master's direction. A harbour-master makes his owners responsible for his acts under circumstances of this character; see the *Rhosina* (1). The captain of the *Apollo* was not a bare licensee,—for he paid tolls for the use of the dock. But if he had been the defendants would not be exempt; for the representations made by Johns as to the safety of the lock amounted to an invitation to enter what was really a trap: see *Indermaur* v. *Dames* (2); and *Gautret* v. *Egerton*, per Willes J. (3). To put an analogous case, if an intending purchaser in a shop takes a seat which is offered him, and the seat breaks and lets him fall to the ground he has a right of action in respect of the injury. The representations made by Johns were an undertaking that there was no hidden danger: and there is a case against the defendants both on the ground of negligence and on the breach of a contract that the lock was reasonably safe. The plaintiffs' case is much strengthened by the fact that other vessels on previous occasions had grounded in the lock for similar purposes. It is obviously necessary that vessels should occasionally ground somewhere in the dock. Where they are to ground it is for the harbour-master to decide. Knowing what he knows—or ought to know—as to the condition of the harbour, and having the powers he has he is under an obligation to take due care, and not to allow a vessel to go where it is not safe.

Sir *R. Webster* A.G. (*Bucknill* Q.C. and *C. C. Macrae* with him) for the respondents:—

The view taken by Butt J. of the facts was the correct one; but assuming that they were as contended for by the plaintiffs there was no liability on the defendants. The *Apollo* went into the lock without paying any extra dues, or anything more than what every ship paid for entering the harbour. It was no benefit to the owners of the harbour to allow the *Apollo* to ground in the lock. It was a mere permission, granted without fee or reward,

(1) 10 P. D. 24, 131. (2) Law Rep. 2 C. P. 311.
(3) Law Rep. 2 C. P. 371, 374.

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and the captain of the ship was a bare licensee. There is no ground for asserting that Johns made any representations which he knew to be false; and in the absence of fraud or wilful injury there is no evidence of any breach of duty on the part of the harbour-master or his employers. All that Johns did was to permit; he made no warranty; he had no authority to make any warranty, or contract or representation as to the use of the lock. His power to place and direct vessels where to go is limited by statute, and is for the purpose of regulating the traffic of the docks. The section which gives him those powers did not contemplate and does not cover such a case as the present, which was an abnormal and extraordinary use of the lock. The lock was a place of passage, not a place for a vessel to ground or remain in. The *Apollo* had loaded and was going out of the harbour; there was not that mutual interest between the harbour and the ship which would give the harbour-master the authority contended for on the other side. This harbour is not intended for the beaching of disabled vessels; it is for vessels to come in afloat, remain for loading or unloading and go out afloat. A mere license to use premises implies no duty on the owner to keep them in a safe condition: see *Gautret* v. *Egerton* (1); *Ivay* v. *Hedges* (2); *Sullivan* v. *Waters* (3); *Southcote* v. *Stanley* (4); *Bolch* v. *Smith* (5); *Wilkinson* v. *Fairrie* (6); *Chapman* v. *Rothwell* (7); Beven on Negligence, pp. 1097–1110, where the cases are collected and discussed. *The Rhosina* (8) does not touch the present case. There the vessel was using the harbour in the way usual and proper to that harbour, and the harbour-master, in exercising the powers conferred on him by the Harbours, Docks, and Piers Clauses Act 1847, was directing the vessel where to ground and was negligent in fact.

Sir *H. James* Q.C. replied.

The House took time for consideration.

(1) Law Rep. 2 C. P. 371.
(2) 9 Q. B. D. 80.
(3) 14 Ir. C. L. Rep. 460.
(4) 1 H. & N. 247.
(5) 7 H. & N. 736.
(6) 1 H. & C. 633.
(7) E. B. & E. 168.
(8) 10 P. D. 24, 131.

July 23. LORD HALSBURY L.C. :—

My Lords, in this case the owners of the *Apollo* screw steamship sued the Port Talbot Company for injury to their vessel while in the dock, of which the defendants are the owners. The vessel was injured by resting on an old sill that lay across the middle of the lock, and projected above the level of the bottom of the lock for some fifteen or eighteen inches. When the water was withdrawn, and the vessel, which was loaded with 400 tons, allowed to rest on this projection, such parts of her as were not supported entirely sank, and the vessel was seriously injured. With respect to the amount of the damages, which were very considerable, no question arises here.

The ship had gone into the dock under circumstances as to which I will say a word presently, and had paid or was to pay for proper dock accommodation, and was subject to the orders and supervision of the dock authorities. While in the dock her screw was fouled in some way not material to inquire into, and it became necessary for the purpose of her prosecuting her voyage that a rope which had entangled her screw should be removed. Ineffectual endeavours were made to accomplish this object by a diver; but ultimately the vessel was placed in the lock with the object of allowing her to rest upon the bottom of the lock and so enabling workmen to get at her screw and disentangle it.

The question is, who was responsible, if any one, for the injuries which undoubtedly took place by the vessel being placed in the lock and the water being withdrawn as I have described.

As a matter of fact, I think there can be no doubt that the vessel was placed there by the authority of a person named Johns. Neither can I doubt that Johns assured the captain of the *Apollo* that it was a safe operation. Unsatisfactory as is the mode in which Johns gives his evidence, yet it seems to me that his own admission of what he stated to the captain of the *Apollo* shews that he did give, and intended to give, an assurance to the captain of the *Apollo* that the operation might be safely performed. Johns admits (Question 606) that the captain came ashore and asked him "what sort of a bottom it was," that in reply he told him "it was stone and brick he had to lay on." The captain asked him whether it was level, and he told him "it

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was level from gate to gate as far as he knew." And then he adds the words that "he had never seen the bottom."

That the captain asked the question with reference to the level of the bottom of the lock, and that Johns answered it in some words which conveyed the assurance that it was so level that the vessel could safely rest upon it, I cannot entertain a doubt, since the object of the captain in asking is clear enough; in asking it that was plainly implied, and that the answer was something that implied safety is all but proved by the fact of the placing of the vessel in the lock for the purpose of the operation, by the assent and under the direction of both the captain and Johns.

I will deal presently with the question of what assurance was conveyed to the captain by the words used, but that they conveyed, and were intended to convey, an assurance that the captain might safely permit his vessel to be placed in the lock for the purpose of being grounded I cannot entertain a doubt.

The question of course remains, what was the extent of Johns' authority, whether he was a mere lockman or a person having authority over the dock? And the more important question still, whether, assuming him to be harbour-master, and invested with the ordinary authority of a harbour-master, the act done by him, or permitted to be done by him, was one which would bind the company of which he was the servant.

My Lords, with the former of these questions we have not now to deal. It is admitted that Johns was acting in Fitzmaurice's (the actual harbour-master's) place, and that his acts may be treated as the acts of Fitzmaurice. But it is contended that even if Fitzmaurice had given the orders or permission which were given, the company would not be liable because the thing done or permitted to be done was, in the language of the Lords Justices, abnormal and extraordinary, and beyond the scope of Fitzmaurice's authority to permit.

My Lords, in dealing with that question, it is important to consider what is the nature of a dock undertaking, and what things may be reasonably expected to be done in a dock the business of which consists in receiving vessels for hire, and providing therein all ordinary dock accommodation.

I cannot think that it is an unusual or extraordinary operation that a vessel should be grounded. In this particular case it was the fouling of the screw, necessitating investigation and repair below the level of the water; but there are many things which may require a vessel to be grounded, and which, I should think, must be in the contemplation of everybody dealing with vessels. An injury may not uncommonly take place below the level of the water of a kind that may necessitate the vessel being grounded. One of the instances given by Mr. Fitzmaurice, the harbour-master, himself is that vessels may want to caulk their sternposts. For such purposes it was not unusual in this particular dock sometimes to use the hard in the river, and sometimes the lock in question. But, speaking generally, I should think that in the nature of such a construction as a dock, and the use to which it is ordinarily put, there would be involved the ordinary accommodation, if it could be safely got, of allowing vessels to ground for the purpose of undergoing repair.

Now, that Johns at least permitted this to be done, and in respect of this particular place, there can be no doubt, and a dock company, I think, must be taken to hold out their harbour-master, or the person who fills that character for the moment, as possessing sufficient authority to inform ships where they may safely ground.

Apart therefore from the controversy who first suggested this operation, and confining myself to the admitted fact that this thing was done by permission of Johns with such assurances of its being safe as induced the captain to act upon them, I am of opinion that the company would be responsible for the harbour-master's act and representations.

I quote Jervis C.J. in *Giles* v. *Taff Vale Railway Company* (1): "I am of opinion that it is the duty of the company, carrying on a business, to leave upon the spot some one with authority to deal on behalf of the company with all cases arising in the course of their traffic as the exigency of the case may demand." In that case the Chief Justice was dealing with a railway company and with the question whether planting quicks and giving directions in respect of them was an act within the authority of

(1) 2 E. & B. at p. 829.

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the general superintendent of the line, and it was agreed that the company was a railway company for carrying goods and not a market gardening company for the purpose of planting "quicks." But the reply was given in the words which I have quoted, and which I certainly adopt. The Chief Justice continues: "I think he had authority, in the exigency of the traffic, to keep the quicks in the mode in which they were kept, and that consequently they were in the custody of the company in the course of their ordinary business."

So here, I think the grounding of the vessel in a place which it may be quite true was not in the original construction of the docks intended as a dry dock, but would, looking to the assurance from the person left in charge of the business of the dock company, be fit and appropriate for the purpose, would be an act which to my mind is neither abnormal nor extraordinary, if by those words it is intended to convey something outside anything that could be ordinarily and reasonably contemplated as part of the business which the dock company were carrying on.

Something has been argued with respect to the particular language in which Johns conveyed the assurance of security; and in order to appreciate this it becomes necessary to add a word or two upon the construction of the lock. It had originally been shorter. The process of lengthening it had left the sill already described across the middle of the lock.

It is almost inconceivable that any one who knew of such an inequality at the bottom of the lock could have permitted such an operation to be performed without seeing the danger to which he exposed a heavily loaded vessel by allowing her to ground there. Johns suggests that he did not know of the obstruction. But, singularly enough, Butt J., while actually finding contributory negligence in the captain for not knowing or inferring that such an obstruction might be there, accepts the explanation of Johns, that he did not know of the obstruction in question. Johns had been there three years, and I am certainly not disposed myself to accept the statement that he did not know what was the nature of the bottom. But to my mind it it is immaterial whether he did or did not. He, as acting harbour-master, was there for the express purpose of giving

directions to vessels how and where they should dispose themselves in the dock of which he was harbour-master. And I think that the captain of the vessel might well be justified in accepting Johns' statement as to the nature and construction of the lock. Whether as a fact Johns knew it or not it is not denied (indeed Johns himself proves it) that he told the captain that the bottom was stone and brick to lie on; he uses words I have already quoted. And he was asked if it was level, and he told the captain "it was level from gate to gate as far as he knew."

My Lords, I do not believe the words of qualification "as far as I know" could have passed. The language Johns admits himself to have used was such as presumed a knowledge of the nature of the bottom, and if there was any qualification which could reasonably have led the captain to suppose that the harbour-master did not know the nature of the bottom upon which he was about to place the ship, I do not believe he would have permitted it to be done.

As I have said, I think it is immaterial whether Johns knew the condition of the bottom or not, because I believe, however conveyed, he did intend to convey, and did convey, an assurance of its security. Of course, I do not mean to deny that if instead of what I believe Johns did say, he had said something to the effect, "You may try the experiment if you like, but I personally do not know what the bottom of the lock is; it may be even or uneven for aught I know to the contrary"—I do not deny that if this, or anything like this, had been the effect of the conversation, the captain would have tried the experiment at his own risk.

The question of contributory negligence was faintly suggested; but in fact it is disposed of by what I have already said, even if insisted on, since whatever presumption might have arisen from seeing the intermediate lock gates (if the captain had seen them, which, as a matter of fact, he did not) would be entirely displaced by the assurance of the harbour-master, if it was given, as I believe it was, that the bottom of the lock was "level from end to end." For I entirely reject the explanation of what the harbour-master says was in his own mind, that he

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referred to the interior gates, when he said "from gate to gate," in reply to a question which, so far as it was important and relevant to the inquiry, he must have understood referred to the safety of the bottom from one end of the lock to the other.

I have for convenience of statement described Johns as the harbour-master. I have done so for one reason, because it has been admitted in the argument he was doing what Fitzmaurice would have done had Fitzmaurice himself been in health to perform his ordinary duties, and therefore, as between the company and the person applying for directions, he was the person held out by the company as the proper person to give directions. The question, it must be remembered, is not whether he was the regularly appointed harbour-master or not. As a matter of fact, I find he was performing the duties which he did perform by the authority of the company, and those duties were of such a character as to my mind to make the company responsible for the negligent performance of the particular duty which is here in question.

For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed, and that the appellants (the plaintiffs in the action) are entitled to judgment and to the costs both here and in the Courts below.

LORD WATSON :—

My Lords, I also am of opinion that in permitting and superintending the use of the entrance lock by the *Apollo* for the purpose of clearing her screw, Captain Johns was within the scope of his authority as acting harbour-master, and that the respondents are therefore answerable for his negligence. In coming to that conclusion I have been influenced by considerations which are fully explained in the opinions of the Lord Chancellor and my noble and learned friend on my left (Lord Herschell), which I have had the advantage of perusing. In these circumstances I do not think it necessary to occupy your Lordships' time, and have simply to express my concurrence in the judgment proposed, and in the reasons which my noble and learned friends have assigned for it.

LORD BRAMWELL :—

My Lords, in this case I find that Johns had the power of harbour-master at the time the *Apollo* was in the dock, and that he had power to permit her to enter the lock as she did for the purpose for which she did. I do not think any one doubts that Fitzmaurice could have given that permission, and I find that Johns had his power at the time. That he had no power to make a contract making the company responsible for the fitness of the lock for a vessel to ground. That he did not do so, but only licensed the use of it tale quale. That he did not order the *Apollo* to go there, as Lord Esher says. That she was not in distress within the meaning of the statute. That the lock was, indeed, within the area of the Act of Parliament, and part of the dock. But that the *Apollo* had no *right* to go there for the purpose for which she did; that purpose was abnormal and extraordinary. She was not ordered or directed to do so, and did not in so doing obey orders of officers; nor do I believe that Johns did more than say he thought the lock was safe. What he said may have amounted to an assurance, but not to a warranty, that the lock was safe. If it did, he had no authority to give it. The circumstances did not make it necessary she should do what she did. She might have been towed outside and lain on the mud. This was at one time contemplated ; but Johns, unfortunately for the defendants, for no profit to them or him, suggested out of goodwill it would be better for the *Apollo* and the owners that she should go into the lock. I entirely agree with Fry L.J. It is manifest from the evidence of Jenkins that it was a license. If only that with an assurance that the lock was safe, on what principle are the defendants liable? Supposing that she went into the lock, as part of the treatment she was entitled to, no doubt the defendants are liable, for they were bound to have every place to which a ship had a right to go in a fit condition to receive her when ordered there. So that whether Johns was negligent or whether the *Apollo's* captain was negligent or not, the defendants would be liable in that case.

If it is taken that Johns contracted for the fitness of the lock, then there are two objections. First, he had no authority to do so, and, next, there was no consideration for his so doing. I

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agree with what was said by Jervis C.J. as quoted by the Lord Chancellor; but it would be as well also to look at what was said in that case by Parke B. and Maule J. (1).

In such a case as this it is impossible that the word "negligence" should not appear. Now I think Johns was negligent. That he believed that the vessel might safely ground in the lock I feel sure. Why should he have let her in if he doubted it? Other vessels had done the same thing safely; but he ought to have made sure and seen if there was a sill, and told the captain of any ship, and let him decide whether he would use the lock. I am satisfied he did not wilfully put the *Apollo* in danger. He was negligent. But what then? No one can complain of negligence unless there was a duty to him of care. Was there any to the owners of the *Apollo*? I say no. The question is the same as that I have discussed. Johns had no authority to undertake any duty of care, nor to undertake that the lock was safe. I do not believe he did so undertake.

The judgment should be affirmed, in my opinion.

LORD HERSCHELL:—

My Lords, the *Apollo*, a vessel of the appellants', left Swansea on the 23rd of December for Port Talbot, laden with about 260 tons of cargo. She passed through the lock which forms the entrance to Port Talbot Dock during the night, and whilst proceeding across the dock to a loading berth her propeller got foul of a rope so that the shaft was jammed, and the engines could not be worked. She was hauled into a loading berth and there took in 140 more tons of cargo. The vessel being thus disabled, it became necessary for steps to be taken to clear the propeller. Accordingly, on the morning of the 25th of December, the vessel, with the assent of the acting harbour-master (I will presently discuss whether that consent is to be regarded as a mere license or otherwise), entered the lock which served as the entrance to the dock in order that the water might be drawn off and access thus obtained to the propeller. After the vessel had taken the ground in the lock, and some feet of water had been drawn off, a cracking noise was heard, and it was afterwards

(1) 2 E. & B. at pp. 831, 833.

found that her keel was broken and her bottom badly strained. It appeared that some years ago the lock, which had been originally only 150 feet long, was lengthened to 300 feet. The gates, which at that time formed one end of the lock, were put back to the wall on either side; but the sill against which the gates had closed was left lying across the middle of the lock, projecting some sixteen or eighteen inches above the level of the bottom. It was owing to this circumstance that the disaster occurred, the vessel not being supported along her entire length upon an even bottom. The question is whether the defendants, who are owners of the dock, are liable for the damage which the *Apollo* thus sustained.

At the trial it was strongly contended on behalf of the respondents that the person whom I have called the acting harbour-master was not discharging any such functions, that he was merely the lockman authorized to pass vessels in and out of the dock; and this view appears to have been adopted by the learned Judge who tried the action. At your Lordships' Bar this contention was abandoned, and it was admitted that he was the acting harbour-master, and that the respondents were as much responsible for his acts as if they had been those of the harbour-master himself, who was at that time confined to bed by illness. I shall, therefore, hereafter refer to Johns, the acting harbour-master, as the harbour-master.

At the trial the further point was made by the respondents, which also found favour with the learned Judge, that the master of the *Apollo* had been guilty of negligence in taking the vessel into the lock. I think this point is quite untenable. The negligence suggested was that the master ought to have seen that the gates still existed at the middle of the lock, and thus should have been led to suspect the presence of the sill across the bottom. There appears to me to be no foundation for this contention. The master of the *Apollo* was a stranger to the locality; he had passed through the lock during the night, and could not have been expected to notice the presence of the gates afterwards. And, so far from there being anything to suggest a doubt to his mind as to the lock being fit for the purpose for which it was used, the original suggestion for its use had come

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from the harbour-master, who might reasonably be supposed to be acquainted with its condition.

Moreover, before entering the lock the master of the vessel made inquiries of the harbour-master as to its fitness for the purpose, and received assurances which satisfied him, and with which I think it reasonable that he should have been satisfied. There is some conflict of evidence as to what passed on this occasion. The master of the *Apollo* states that in reply to the question "Are you sure that the vessel will take no harm?" the harbour-master said, "I am satisfied of that; there will be no damage to the vessel"; and in answer to a further question, "What is the bottom of your dock composed of—sand, mud, or stones?" replied, "The bottom of the lock is all lined with bricks, and is as smooth as the back of your hand." He adds that the harbour-master mentioned that a vessel called the *Gogo* had been there a little time before under similar circumstances. Johns denied that he used this language. His version of the conversation is that the master, having asked him what sort of bottom there was to lay on, he replied that there was stone and brick to lay on; that the master then asked if it was level, to which he answered that it was level from gate to gate as far as he knew, that he had never seen the bottom. He asserts that by the expression "from gate to gate" he meant from the inner gate to the disused middle gate, and not the whole length of the lock; and that he had never seen the bottom, because when the water is drawn off some eighteen inches still remain over the sill; but he admits that he knew that there must be either a sill or a chamber there.

The learned Judge who tried the action accepted Johns' version rather than the master's, which he thought improbable. I am unable to take this view, and I differ from the learned Judge with the less hesitation, inasmuch as that which he accepts as a true statement of what passed does not seem to me to be at all an accurate representation of Johns' evidence. Taking Johns' own version, it is clear that the language he used was calculated to convey to the mind of the master of the *Apollo* that the bottom of the lock was level throughout, from the inner to the outer gate, and the fact that, according to him, he intended to

limit his statement to a part of the lock satisfies me that as to that portion he intended to convey the impression that it was level. Seeing that the suggestion to put the vessel into the lock came from him, I do not believe that he conveyed, or intended to convey, any doubt as to its being fit for the purpose. He perhaps overlooked the length of the vessel, or the fact that she was in part laden; but however this may be, I think he gave the master of the *Apollo* assurances which led him as a reasonable man to place his vessel where he did.

But it is said that even supposing that the master of the *Apollo* was guilty of no want of care in taking his vessel into the lock, the disaster was not due to the negligence of the harbour-master, for that there never can be negligence unless there is some duty to exercise care, and that no such duty was incumbent on Johns, with reference to the vessel being grounded in the lock. It was argued further that even if Johns were guilty of negligence, the acts complained of were not done by him in the course of his duty, or within the scope of his authority, and that the respondents therefore cannot be held responsible.

These are the real questions in the case, and that they present some difficulty cannot be doubted, seeing that there was a difference of opinion in the Court of Appeal, and that your Lordships do not all take the same view. In order to solve them we must consider the relative positions of the master of the vessel, the harbour-master, and the dock owners, at the time of the incidents which gave rise to this litigation. It is contended for the respondents that in using the lock the master of the vessel was a bare licensee, to whom neither the harbour-master nor the owners of the dock owed any duty except to abstain from fraud, or from wilfully causing his vessel injury. I cannot think that this is a true view of the situation of the parties. The use of the harbour, which is the property of the respondents, is regulated by Act of Parliament, by which it is provided that it shall be lawful for the harbour-master to direct any person having command of a vessel entering or being within the port or harbour, to moor, anchor, and place the same in such situation within the port or harbour as the harbour-master shall direct, and in case the master of the vessel refuses or neglects to

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remove the same when required and to anchor and place the same as the harbour-master shall order, he is rendered liable to a penalty, and the harbour-master is empowered to cause the vessel to be removed in such manner as he shall deem to be necessary. And the owners of the port or harbour are by the Act authorized to take certain tolls for its use. In view of these enactments let me consider what was the position of the master of the *Apollo*. His vessel was disabled, and in order to restore her to a working condition it was necessary to get at the propeller. If he wished to beach his vessel for this purpose he could only do so at a place indicated or permitted by the harbour-master. It is said that he was not entitled to enter the lock for that purpose: I agree. But it is equally true that he was not entitled to occupy any particular part of the respondents' dock or harbour. He could, as I have said, occupy only such place as the harbour-master might direct or permit. But when the harbour-master indicates any particular part of the dock or harbour as a place where a vessel which for a reward is using the dock or harbour may be grounded for the purpose of repairing damage or otherwise, I think it is at the least incumbent upon him to use due care not to indicate a place which cannot safely be used for the purpose by reason of some hidden condition of things of which he is or ought to be aware, but of which the master of the vessel is, without any want of care, ignorant. If the master of a vessel which is using the dock finds it necessary, owing to a misadventure, to put it on the ground, he has I think a right to rely on the judgment of the harbour-master as to what is a proper place in which to perform such an operation. The harbour-master was of course not bound to permit the vessel to enter the lock for the purpose. He might undoubtedly have refused his permission and directed that the vessel should be grounded in some other part of the dock, or perhaps have refused permission for the vessel to take the ground anywhere within the limits of his jurisdiction. But inasmuch as he did not adopt this course, but expressly assented to the vessel being put in the lock that it might cease to be waterborne, and indeed himself suggested that this should be done, I find myself unable to concur in the view that he was under no obligation to the vessel if the condition of

the lock was such that she would be injured by resting on the bottom of it; the more so as he gave the master of the vessel assurances which might reasonably lead him to believe that the bottom of the lock was level and a safe resting-place for the vessel. I think that the harbour-master, before assenting to the vessel being so placed and giving that assurance, was bound to inform himself of the condition of the lock and to ascertain that it was not such as to cause damage to the vessel. I think he knew or ought to have known of the danger, for he admits that he was aware, as he could hardly fail to be, of the existence of the gates, and that there must be either a sill or a cavity, against or by reason of which the gates could be closed. And it was just as likely to be the one as the other. It appears to me that if he was under the obligation I have indicated, or if any care was under the circumstances due from him to the master of the vessel, he cannot escape the charge of negligence. If, indeed, he had told the master that he knew nothing of the condition of the lock, that if the vessel entered it for the purpose of clearing the propeller she must do so at her own risk, and that the master must make such investigation as was necessary to satisfy himself on the point, the case would have worn a different aspect. But nothing of the kind occurred. I entertain a strong conviction that had he done this the disaster would have been avoided.

It is said, however, that even if Johns was guilty of negligence the respondents are under no liability; that to sanction such a use of the lock was to permit an abnormal use of it, which he had no authority to do, and which was an act beyond the scope of his employment. I cannot think so. The lock had not unfrequently been employed for the same purpose before. It was one of the conveniences of the port that a disabled vessel could thus enjoy some of the advantages of a dry dock. For a vessel of somewhat smaller dimensions than the *Apollo*, and perhaps even for one of her size, if unladen, the lock was quite a suitable place to take the ground in. That an accident might happen to a vessel which should temporarily disable her and render it necessary to obtain access to a part of her which could not be reached whilst she was waterborne, was one of the ordinary incidents of navigation which must have been in the contemplation

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of the owners of the dock. And I do not think it can be beyond the authority of their harbour-master, intrusted as he is with the statutory power to which I have drawn attention, to permit the use by a disabled vessel of such conveniences as the harbour possesses for the purpose of repairing or ascertaining the extent of the damage. I think it must be within the scope of his authority to point out in what part of the harbour the vessel may ground, and the lock was within the ambit of the port and harbour, and just as much a part of it as any other, and it had, as I have said, been used on various previous occasions, extending over a considerable period, for that purpose.

For these reasons, I think Johns was acting as harbour-master, and within the scope of his authority as such, on the occasion in question, that he was guilty of negligence, and that for this negligence the respondents are liable.

My noble and learned friend Lord Macnaghten, who has been compelled to leave the House, desires me to say that he has read this judgment and entirely concurs in it.

LORD MORRIS:—

My Lords, I assume that Johns was acting as harbour-master in consequence of the illness of Fitzmaurice, and that as between the defendants and persons using the dock he is to be considered the harbour-master. In that capacity he was the person to give directions, and to bind the defendants in all matters within the scope of his employment and authority; consequently, if Johns, as harbour-master, ordered or directed the captain of the *Apollo* to place his vessel in the lock as the proper place for her to be moored or placed, I would be of opinion that the defendants would be liable for his negligence, if any, in so ordering or directing. I consider, in concurrence with the learned Judge who tried the case and heard the witnesses, that Johns did not direct the *Apollo* to be put into the lock, but only assented to the request made to him to permit it to be done; that, in fact Johns granted as a favour permission to use the lock for the purpose of letting out the water from it, and thereby enabling the captain to disentangle the rope.

In the port of Port Talbot there was no dry or graving dock,

and the use of the lock for which permission was given was an extraordinary one. The normal use of the lock was for the passage of vessels, and the use of it as a substitute for a dry dock was an extraordinary and abnormal use of the lock. The captain of the *Apollo* was a mere licensee in the carrying out in the lock of his operations for disentangling the rope. Johns was not aware of the sill in the lock; he had no authority, and it would be outside the scope of his authority as harbour-master to allow the use of the lock with any special liability affecting the defendants; he did not do so as a matter of fact. In giving license to the captain to use the lock, Johns had no duty towards the captain upon which he could make his employers liable; nor did he make any contract on their behalf in giving permission that the lock might be used as it was used. The captain in using the lock did so at his own risk; it was no part of the accommodation to which the ship was entitled. The case is one of licensor and licensee; the licensor has not wilfully, or with knowledge of any danger, induced the licensee to incur it. Under these circumstances, I fail to see how the defendants can be made liable for the damage suffered by the ship, and I am of opinion the judgment of the Court of Appeal should be affirmed.

Decree of the Admiralty Division and order of the Court of Appeal reversed, and judgment entered for the plaintiffs below, with costs here and below; cause remitted to the Admiralty Division.

Lords' Journals, 23 July 1891.

Solicitors for appellants: *Rowcliffes, Rawle & Co. for Hill, Dickinson & Co., Liverpool.*

Solicitors for respondents: *Maples, Teesdale & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1891 July 30.

H. MEYER & CO. LIMITED . . . . . APPELLANTS;

AND

JULES DECROIX, VERLEY ET CIE. . RESPONDENTS.

Bill of Exchange — Negotiable Instrument — Acceptance, whether qualified — Words prohibiting Transfer — Acceptance "in favour of Drawer only" — Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 8, 19, 36.

If the acceptor of a bill of exchange desires to qualify his acceptance, he must do so on the face of the bill in clear and unequivocal terms, and so that any person taking the bill could not if he acted reasonably fail to understand that it was accepted subject to an expressed qualification.

A bill of exchange was drawn by L. Delobbel Flipo payable "to order Mr. L. Delobbel Flipo." The drawees stamped in printed letters across the face of the bill the words "Accepted payable at Alliance Bank London for" the drawees. Above these words the drawees wrote "In favour of Mr. L. Delobbel Flipo only. No. 28." The word "order" was struck out, but when or by whom did not appear. In an action on the bill by indorsees for value against acceptors:—

Held, Lords Bramwell and Morris dissenting, that looking at the position and collocation of the words as they appeared on a facsimile of the bill, the words "in favour of Mr. L. Delobbel Flipo only" did not constitute a qualification of the acceptance, that the acceptance was a general acceptance of a negotiable bill, and that the action was maintainable.

Held by Lords Bramwell and Morris that the acceptance was not general but amounted to an acceptance payable to L. Delobbel Flipo only, and that the bill was not negotiable.

The decision of the Court of Appeal (25 Q. B. D. 343) affirmed.

APPEAL from an order of the Court of Appeal (1) upon a special case of which the following are the material parts:—

The action was brought by the respondents as indorsees against the appellants as acceptors of a bill of exchange. The bill was drawn by L. Delobbel Flipo upon the defendants, a company carrying on the business of merchants and agents in London, as follows:—

"Roubaix, Sept. 12th, 1889.

"On October 31st after date pay to order Mr. L. Delobbel Flipo £778 4*s.* 2*d.* Value received." The defendants accepted

(1) 25 Q. B. D. 343.

the bill as follows:—Across the face of the bill they stamped in printed letters the words "Accepted payable at Alliance Bank London for H. Meyer and Co. Limited." Then followed the signatures of two directors of the defendant company countersigned by the secretary. Above the word "accepted" the defendants wrote the words "In favour of Mr. L. Delobbel Flipo only," and between those words and the word "accepted" they wrote "No. 28." The word "order" was struck out, but when or by whom did not appear.

Flipo on receiving the bill sent it to the plaintiffs, bankers at Lille in France, who discounted it for him. It was not noticed by the plaintiffs that the bill had been accepted in any unusual form. They did not understand the English language, and their attention was not called to the form of the acceptance until after the dishonour of the bill at the Alliance Bank. It was not suggested that there is any custom amongst merchants upon which the acceptors could rely by which the addition of the words "In favour of Mr. L. Delobbel Flipo only" restricts the negotiability of the bill. The defendants relied solely on the provisions of the Bills of Exchange Act 1882. The question for the opinion of the Court was whether the plaintiffs were entitled to recover in the action. Judgment to be entered accordingly. The Divisional Court (Cave and A. L. Smith JJ.) held that the acceptance was a qualified acceptance, rendering the bill not negotiable, and gave judgment for the defendants, the present appellants. The Court of Appeal (Lord Esher M.R., Lindley and Bowen L.JJ.) reversed that decision and entered judgment for the plaintiffs, the present respondents, for the amount claimed (1).

June 30. Sir *R. E. Webster* A.G. and *Horne Payne* Q.C. (*G. S. Bower* with them) for the appellants:—

It cannot be disputed that an acceptance may be qualified so as to restrict the negotiability, and the only question is whether the acceptance in this case was so qualified. Before the Act of 1882 it was clear that an acceptor could qualify his acceptance by making the bill payable at a particular place. When so

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accepted, the presentment must be at the named place and nowhere else: see *Rowe* v. *Young* (1), where the question of qualified acceptances is discussed at length by Lord Eldon. The Bills of Exchange Act 1882 (45 & 46 Vict. c. 61) s. 8 sub-s. 1 says: "When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable." Formerly a bill payable to A. B. without more was not negotiable: see Byles on Bills (15th ed. pp. 93, 94 note (x)). But now such a bill is negotiable by sub-sect. 4, which says: "A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person and does not contain words prohibiting transfer, or indicating an intention that it should not be transferable." To restrict negotiability the qualification must no doubt be such that any reasonable person reading it would see that it was qualified. If it be not clear the construction most unfavourable to the acceptor must be taken. In this case it is submitted that the words "in favour of Mr. L. Delobbel Flipo" were plainly intended to have some meaning. They cannot be rejected as surplusage. What could they mean but that the bill was payable to Mr. L. Delobbel Flipo only? If they did not mean that they were unmeaning. The attention of any reasonable man would be struck on reading such an acceptance, so long, so expressed, and partly in writing and partly printed. Such a man would conclude that the acceptance was intended not to be general, not of the ordinary kind. Even if the effect of the words were doubtful, the striking out of the word "order" would make it clear that the acceptors intended to be liable on the bill to Flipo only, and not to an indorsee. Against indorsees the acceptors could not set off claims they might have against the drawer. To construe the contract binding the acceptors, the terms of the bill and the acceptance must be read together. The striking out the word "order," coupled with the word "only," destroyed the statutory presumption which —without the use of the word "only"—would make the words "Mr. L. Delobbel Flipo" equivalent to "Mr. L. Delobbel Flipo or order." "A general acceptance," says sect. 19 sub-sect. 2,

(1) 2 B. & B. 165.

"assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn." If such an acceptance as this is an assent without qualification, it is not easy to see how an acceptor who desires to reserve his rights against the drawer is to do so. The instances of a qualified acceptance given by sect. 19 are only instances, and are not intended to be an exhaustive list. In the present case the acceptance was prior to the drawer's indorsement. Flipo might have written to the acceptor for an unqualified acceptance, but for good reasons no doubt he was content to take any acceptance he could get.

Finlay Q.C. and *R. M. Bray* for the respondents:—

The word "accepted" made the acceptance general and the bill negotiable. The words "in favour of Mr. L. Delobbel Flipo only. No. 28" have no effect except as a memorandum. "In favour of" is not the same as "payable to." Whether the words "in favour of" have any meaning at all may be doubtful, but at the highest they are ambiguous, and to restrict negotiability the qualification of an acceptance must be clear and unmistakeable.

They also referred to *Steele* v. *McKinlay* (1) and *Smith* v. *Vertue* (2).

Sir *R. Webster* A.G. in reply.

The House took time for consideration.

July 30. LORD HALSBURY L.C.:—

My Lords, I am of opinion that in this case the judgment of the Court of Appeal ought to be affirmed.

The action was brought by the plaintiffs, who are bankers at Lille, against the defendants, a limited company, carrying on business in London, upon a bill drawn by one Flipo, and accepted by the defendants. The only question is whether the bill, as accepted, was a negotiable instrument.

My Lords, I think it is impossible adequately to discuss the questions that arise in this case without having a facsimile

(1) 5 App. Cas. 754, at p. 781. (2) 30 L. J. (C.P.) 56.

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of the bill before you. As to the form which purports to be the acceptance, no one can doubt that it was an ordinary mercantile form accepted and payable at the Alliance Bank with the proper signatures. But the question arises by reason of some words written above that which every mercantile man would look upon as the acceptance, and these words are "In favour of Mr. L. Delobbel Flipo only. No. 28." These words are written above what I have called the acceptance, and I think any mercantile man would regard the words I have quoted as something apart from and not forming any portion of the acceptance itself. Nor is it easy to construe them as giving any qualification to the acceptance. I think much depends upon the exact form, an apparently complete stamped acceptance being found in its usual place on the bill.

A known mercantile instrument with the word "accepted" printed by a stamp, and in ordinary mercantile form, is sought to be cut down and qualified by some words written, it is true, on the same piece of paper, and above the acceptance, but which to my mind, even now that I have heard the argument, convey no particular meaning.

I am not certain that I understand what is the true meaning of the words, treated as separate writing, "In favour of Mr. L. Delobbel Flipo only." The form of the instrument, so far as the ordinary mercantile language is concerned, is quite intelligible. The bill is accepted, payable at a particular bank. It is suggested in the argument that it was intended that these words should tell the holder of the bill that it was only payable to the drawer himself. I am not certain that I can even now gather the meaning of the words themselves, but I am quite certain that any ordinary mercantile man, looking at the stamped acceptance in ordinary form and stamped across the bill, would assume that it was a clean acceptance, and that the words written above it, whatever the meaning they might convey to the immediate parties, would certainly not convey anything which would qualify or cut them down to a person who had nothing before him but the bill itself.

I am happy to think that the decision in this case involves nothing more than the proposition that if a person writes across a bill that which unqualified would, in ordinary course, import a

clean acceptance of a bill, and intends to qualify its operation, he must do so by plain and intelligible language, and make that qualification sufficiently part of the acceptance itself to be intelligible in the ordinary course of business. If any other principle were laid down I think it would be fatal to the convenience of trade and the conduct of mercantile affairs, which demand for their transaction convenient and compendious forms, to which the law merchant has attached a definite meaning. Such ambiguous and inappropriate language as is sought to make here a qualification of an ordinary mercantile instrument would defeat the very object which mercantile instruments are intended to effect.

I move your Lordships that the judgment of the Court of Appeal be affirmed and this appeal dismissed with costs.

LORD WATSON:—

My Lords, a bill of exchange for £778 4*s.* 2*d.* was drawn in France by one L. Delobbel Flipo, in favour of himself as payee, and was accepted by the appellants in London, payable there at the Alliance Bank. When the bill matured, the appellants refused to make payment to the respondents, who are indorsees for value, upon the ground that, by the special terms of their acceptance, its contents were payable to Flipo only.

In this action, which has been brought by the respondents, the law of France is not pleaded by either party. The issue between them is raised by a special case, the fifth article of which states: "It is not suggested that there is any custom upon which the defendants can rely, by which the addition of the words 'in favour of L. Delobbel Flipo only' restricts the negotiability of the bill. The defendants rely solely on the provisions of the 'Bills of Exchange Act, 1882.'"

Clause 19, sub-s. 2 of that Statute enacts that "a qualified acceptance in express terms varies the effect of the bill as drawn." In order to produce that effect, the words of qualification must, in my opinion, be incorporated in the acceptance, or at least so connected with the acceptance as obviously to form part of it; and must also be such as to indicate clearly and unequivocally the nature of the restriction which they are meant to introduce.

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There is a clean acceptance by the appellants stamped in printed letters across the face of the bill; above that acceptance, on separate lines and forming a separate paragraph, appear the words "In favour of Mr. L. Delobbel Flipo only. No. 28." These words and figures are in writing, with the exception of the word "No.," which is stamped.

In the position which they occupy, I do not think the words "In favour of Mr. L. Delobbel Flipo only" can be regarded as part of the acceptance, or have the effect of qualifying its terms. They are not inserted in it, and are not grammatically connected with it, but occur as a preface to "No. 28," which forms no part of the acceptance. "No. 28" is a memorandum for the purpose of accounts kept between the acceptors and the drawers, or between the former and their bankers, and therefore relates to matters with which holders of the bill, or persons acquiring right to it, have no concern. In my opinion, the preface would naturally be regarded as an integral part of that memorandum having no reference to the terms of the acceptance, and would not convey any intimation that the acceptance was meant to be restricted.

I am accordingly of opinion that the order of the Court of Appeal ought to be affirmed.

LORD BRAMWELL:—

My Lords, I consider what was written and printed by the defendants on the face of the bill as one—one thing only—an acceptance and no more, not an acceptance and something else. That being so, I am unable to see any difference between "In favour of Flipo only, accepted payable," &c., and "Accepted in favour of Flipo only, payable," &c. I do not know where the *body* of the acceptance begins, unless at the beginning of what is written. It is said that "In favour of Flipo only" does not necessarily mean the same as "accepted in favour of Flipo only." I think it does; but if not necessarily, what does it naturally mean? Especially when it is remembered that the word "order" was erased. That was no doubt unauthorised, if done by the drawees, but it clearly shews the intention of the drawees if done by them, and the knowledge by the drawer of that intention if

done by him. The striking out of "order" was not a memorandum for the use of the drawees. I cannot find that any other cause for what was done can be suggested.

As to the thing being clear and unequivocal, I begin to doubt if there is such a thing, but it is enough if words are intelligible. Can there be a doubt that this bill might have been protested for non-acceptance according to its tenor? I suppose from the form of the acceptance that the appellants thought they had, or might have, some cross-claim against Flipo. Flipo, probably, was glad to get anything from them, and so put up with the acceptance, and perhaps indorsed it in satisfaction of a bad debt to those glad to get anything from him.

LORD HERSCHELL:—

My Lords, the respondents in this case seek to recover from the appellants the amount of a bill of exchange accepted by them. The defence set up is that the acceptance was a qualified one, and restricted the right to require payment to the payee alone, and that the acceptors are therefore under no obligation to the respondents who took by indorsement from him.

It was not disputed at the bar that the acceptor of a bill of exchange may make his acceptance a qualified one. If he do so the drawer may of course refuse to take such an acceptance, and treat the bill as dishonoured; but if he takes the bill, the obligation of the acceptor is not absolute, but subject to the qualification which he has introduced. I think further that it is beyond dispute that if an acceptor seeks to qualify his acceptance, and thus to modify the obligations which an acceptance ordinarily imposes, he must do so on the face of the bill in clear and unequivocal terms, and in such a manner that any person taking the bill, if he acted reasonably, could not fail to understand that it was accepted subject to an expressed qualification.

About these propositions I do not think there can be any difference of opinion; the difficulty lies in applying them to the facts of the particular case. The bill in question was drawn in France by a person named Delobbel Flipo upon the appellants, and forwarded to London for their acceptance. The bill is drawn on a printed form containing the word "order"

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immediately preceding the name of Delobbel Flipo, which has been inserted as the payee of the bill. This word "order" has been erased, but by whom does not appear, nor do I think it material. If, as suggested, it was done by the acceptors, they were not justified in making the erasure, and in any case there would be nothing to shew a person taking the bill that the word had not been struck out by the drawer at the time he inserted the name of the payee. I do not think, therefore, that the erasure of the word "order" can in any way assist the contention that the acceptance was a qualified one. That must be determined by a consideration of the effect of the words written across the bill by the acceptors.

For the purpose of accepting the bill the appellant company impressed upon it by means of a stamp the words "accepted payable at Alliance Bank London," underneath which the signatures of two directors and the secretary were written. The acceptors wrote across the bill above the word "accepted" the words "In favour of Mr. L. Delobbel Flipo only": between these words and the word "accepted" was written "No. 28." In considering whether the effect of the words "In favour of Mr. L. Delobbel Flipo only" was to make the acceptance a qualified one in the manner suggested, regard must be had both to the words used and to the situation in which they are placed. It may be that if the same words had been found in the body of the acceptance following the word "accepted," they would have amounted to the qualification contended for. The presence of any words in the body of the acceptance would of itself suggest the idea that some qualification of it was intended; but where the words are not inserted in the body of the acceptance, I do not think the same impression is likely to be produced, though the words may, of course, be so clearly intended to qualify the acceptance and so incapable of any other reasonable construction that they would be as effectual for the purpose. But in the present case the words written above the acceptance are not "Payable to Delobbel Flipo only," which is the meaning sought to be attached to them, but "In favour of Delobbel Flipo only," which do not seem to me necessarily to bear the same meaning. The words "in favour of," when used in relation to a bill of

exchange, do not ordinarily mean that it is payable only to the person in whose favour it is said to be drawn; the words are equally applied when the bill is made payable to his order. The words "In favour of," therefore, are properly paraphrased by "payable to, or to the order of"; but then it is said that the insertion of the word "only" after Flipo's name would shew that this could not be the meaning intended. It must be remembered however that between these words and the acceptance "No. 28" was inserted, which separates the words which it is suggested qualify the acceptance from the acceptance itself.

Under these circumstances I do not think that it is impossible that a person taking the acceptance by way of indorsement might suppose that the words "In favour of Delobbel Flipo only" were, like the "No. 28," a mere memorandum inserted by a party to the bill, and not intended to affect the acceptance. It might be supposed to indicate that it was the 28th bill, or No. 28 of the bills accepted "in favour of Delobbel Flipo only," as distinguished from bills accepted in favour of Flipo and some other persons. I do not say that this would be the interpretation given to it by a person who carefully and critically considered it. But that is not the question. It is impossible, as I have said, to dissociate the words used from the position and collocation in which they are found, and if these be such as to suggest that the words are a mere memorandum, a person taking the bill, even if he exercised the ordinary care to be expected in such transactions, would not be likely to examine or weigh them with the same care as if they were found in the body of the acceptance.

In my opinion the qualification was not made in clear and unequivocal terms, and in such a manner that any person taking the bill, if he acted reasonably, could not fail to understand that it was accepted subject to that qualification. I think, therefore, the judgment ought to be affirmed.

LORD MORRIS:—

My Lords, the respondents are French bankers and sue the appellants, who are a limited company carrying on business in London, to recover the amount due on foot of a bill of exchange

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for £778 4*s.* 2*d.*, dated the 12th of September 1889 drawn by one L. Delobbel Flipo, accepted by the appellants and endorsed by Flipo to the respondents, who discounted the bill for Flipo. A fac simile of the bill is set out in the special case. I assume that when drawn by Flipo and when sent by him for acceptance, it contained in the body of the bill the word "order"; but that before accepting the bill the appellants struck out the word "order"—by doing which the bill would, except for the Bills of Exchange Act, 1882, s. 8, sub-s. 4, be a bill payable to Flipo only, and would not be transferable. The appellants' case states that the bill was so altered in the body by the appellants when accepting, and it was not controverted by the respondents. I attach some importance to this, as an erasure of the word "order" in the body of the bill ought to have attracted the attention of the respondents and made them scan the acceptance carefully. It is stated that the respondents do not understand the English language, and that their attention was not called to the "form of the acceptance" until after the dishonour of the bill; but their not understanding English cannot avoid the natural and reasonable effect of the acceptance.

The Queen's Bench Division held that the bill was not negotiable. I concur in that judgment and in that of my noble and learned friend Lord Bramwell. I read the words "In favour of Mr. L. Delobbel Flipo only" as indicating an intention that the bill should not be transferable within the meaning of s. 8, sub-s. 1, of the Bills of Exchange Act, 1882, as equivalent to the words "payable to L. Delobbel Flipo only"; and I do not attribute any importance to the insertion of "No. 28" between the words qualifying the acceptance and the stamped acceptance. It is not adverted to in any of the judgments in the Court of Appeal; it was most probably the number of bills that had been then accepted. But it is said the qualified acceptance should be plain and intelligible, and that, of course, there are several modes of expressing the qualification of the acceptance upon which no question could arise. That is so; but it does not solve the question here, whether in the present case the acceptance fairly and intelligibly indicated, not to a person who could not read it, but to one who could, that the acceptance was a qualified

one. The qualifying words "In favour of L. Delobbel Flipo only" immediately precede, are connected with, and control the stamped acceptance which follows. They should have attracted the respondents' attention, when they would have observed what in the Special Case is called "the form of the acceptance," that is the qualifying form of the acceptance. The respondents ought to have observed it, and if they had, they would have read the terms on which the appellants had affixed their stamped acceptance.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 30th July 1891.

Solicitors for appellants: *William Webb & Co.*
Solicitor for respondents: *Gilbert E. Samuel.*

[HOUSE OF LORDS.]

THE COMMISSIONERS FOR SPECIAL PURPOSES OF THE INCOME TAX } APPELLANTS;

AND

JOHN FREDERICK PEMSEL . . . . RESPONDENT.

Revenue—Income Tax—Allowances—"Charitable Purposes"—Certificate—Procedure—Mandamus to Commissioners—5 & 6 Vict. c. 35, Sched. A, s. 61, No. VI., s. 62.

By 5 & 6 Vict. c. 35, s. 61, No. VI., allowances in respect of the income tax imposed by Sched. A are to be granted by the Commissioners for Special Purposes of the Income Tax on (inter alia) the rents and profits of lands, tenements, hereditaments, or heritages, vested in trustees for charitable purposes, so far as the same are applied to charitable purposes.

In a case where an allowance which ought to be granted is refused mandamus lies to the Commissioners commanding them to grant the allowance and to give a certificate of the allowance with an order for the payment thereof.

Lands in England were conveyed by deed in 1813 to trustees upon trust after payment of costs and outgoings to apply two-fourths of the rents and profits for the general purposes of maintaining, supporting and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, commonly known as the Moravian Church; and to

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apply the remaining two-fourths for purposes which were admitted in argument in this House on behalf of the Crown to be charitable within the meaning of the Act. On a claim for the allowance in respect of the whole trust:—

Held, Lord Halsbury L.C. and Lord Bramwell dissenting, that the words "charitable purposes" in the Act were not restricted to the meaning of relief from poverty, but must be construed according to the legal and technical meaning given to those words by English Law and by legislation applicable to Scotland and Ireland as well as England, and that the allowance ought to be granted.

Held, by Lord Halsbury L.C. and Lord Bramwell, approving the decision in *Baird's Trustees* v. *Lord Advocate* (15 Sc. Sess. Cas. 4th Series, 682), that the technical construction of the words "charitable purposes" imputed to English Law had never been adopted in Scotch Law; that in a taxing Act applicable to the whole of the United Kingdom the words could not receive that construction; and that since the trust for missions among heathen nations contemplated purposes having no relation to the relief of poverty the purposes were not "charitable" within the meaning of the Income Tax Act, and that the allowance ought not to be granted in respect of that portion of the trust.

The decision of the Court of Appeal (22 Q. B. D. 296) affirmed.

Baird's Trustees v. *Lord Advocate* (15 Sess. Cas. 4th Series, 682) disapproved.

APPEAL from a decision of the Court of Appeal (1).

By deed in 1813 Mrs. Bates conveyed certain lands in Middlesex to trustees upon trust after payment of costs and outgoings to apply the rents and profits as follows:—1. As to two-fourths, for the general purposes of maintaining, supporting and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, known by the name of Unitas Fratrum, or United Brethren; 2. As to another fourth, towards the maintenance, support and education of the children of ministers and missionaries of the said Church educated at the school and academy at Fulner, near Leeds, special regard being had to the children of such ministers as are least able to support the expense of their children's education, or for the benefit and purposes of any similar school, academy or establishment elsewhere within the United Kingdom; 3. As to the remaining fourth, towards the maintenance and support of certain establishments appertaining to the said Church for single persons, called choir-houses, within the United Kingdom. It appeared that

(1) 22 Q. B. D. 296.

the inmates of the choir-houses were divided into three classes: 1. Single women who have been engaged in the educational department of the Church and have become incapacitated; 2. Widows of ministers or missionaries and of poor members; 3. Single men whose chief employments are to look after the young and to assist in education.

By 5 & 6 Vict. c. 35, s. 61, No. VI., Sched. A, allowances are to be granted by the Income Tax Commissioners on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes (1). Under this enactment allowances were until 1886 annually granted by the Commissioners in respect of the rents and profits of the above lands, and a return of the income tax paid by the tenants was made to the trustees, but in 1886 the usual application for a return of the income tax for the year ending the 5th of April 1886—amounting in this instance to £73 8*s.* 3*d.*—was refused by the Commissioners.

An order of the Queen's Bench Division was made calling on the Commissioners to shew cause why a writ of mandamus should not issue commanding them to grant to Pemsel (the treasurer of the Church of the United Brethren, commonly called the Moravians) the allowance of £73 8*s.* 3*d.* in respect of rents and profits of lands on which property or income tax to that amount had been paid in respect of the year ending the 5th of April 1886, and to give a certificate of such allowance together with an order for payment of the same as provided by s. 62 of 5 & 6 Vict. c. 35. That order was after argument discharged, Lord Coleridge C.J. being against the allowance and Grantham J. in favour of it. This decision was reversed by the Court of Appeal (Lord Esher M.R., Fry and Lopes L.JJ.), the Court making an order that a peremptory writ of mandamus do issue for the purpose aforesaid (2). Against that order the Commissioners brought the present appeal. During the argument the appellants' counsel admitted that an allowance ought to be granted with respect to the third fourth in trust for the maintenance of the children

(1) The section is set out at greater length in the judgment of Lord Halsbury L.C.

(2) 22 Q. B. D. 296.

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of ministers, &c.; also with respect to the remaining fourth in trust for the maintenance of choir houses.

1890. March 20, 21, 24. Sir *E. Clarke* S.G., and *Dicey* Q.C. (Sir *R. Webster* A.G. with them) for the appellants :—

The two questions now in dispute are first whether the purposes of supporting the missionary establishments among heathen nations of the Moravian Church are "charitable purposes" within the meaning of the Income Tax Act of 1842; and secondly whether the proper form of procedure is by mandamus. As to the first the principles laid down in the judgment of Lord Esher M.R. are, it is submitted, correct, though their application is erroneous. Lord Esher admits that charity implies the relief of poverty and that there must be in the mind of the donor an intention to relieve poverty; and that if the purpose in the present case was to convert rich heathen or heathen without regard to their poverty, it could not come within the exemption. On these principles the decision should be in favour of the Crown. There is nothing in the trust deed shewing an intention to relieve poor heathens; on the contrary the manifest intention is to spread the doctrines of the Moravian Church among heathens indiscriminately. Such a purpose may be public spirited, pious, kindly, benevolent; but it is not charitable in the ordinary, natural, and proper use of the word: see the observations of Sir W. Grant M.R. in *Morice* v. *Bishop of Durham* (1). The propagation of moral, political or religious opinions is not "charity." There must be something in the nature of relief of temporal wants to constitute a charity. The judgment of Fry L.J. goes much further than the other judgments. According to that judgment the term "charitable purposes" is a legal and technical term embracing a great variety of objects which do not involve the idea of the relief of poverty; and the legal meaning of this term has been the subject of a long series of decisions of the English Court of Chancery in cases arising under 43 Eliz. c. 4, the Mortmain Act, and other statutes. As an instance of decisions under the Mortmain Act, 9 Geo. 2, c. 36, which was directed against gifts by dying persons to "charitable uses," see *Trustees of British Museum*

(1) 9 Ves. 399, 405.

v. *White* (1), where it was held in 1826 that a gift for the benefit of the British Museum was a gift to a charitable use within the meaning of that Act. But there is a serious difficulty in the way of importing that meaning into the Income Tax Act. That Act applies to the whole of the United Kingdom; and in construing such an Act words must be understood in their ordinary and popular significance, and in a general sense applicable to the three kingdoms, and not as "technical legal terms belonging to one system of jurisprudence, which may exist in one part of the United Kingdom and not in another." This was the view taken of the Income Tax Act by the Court of Session in *Baird's Trustees* v. *Lord Advocate* (2). That case is a strong authority for the Crown that the extended meaning of the word "charitable" does not prevail in Scotch jurisprudence. And see the decision of this House in *Lord Saltoun* v. *Lord Advocate* (3), where it was held that in construing the Succession Duty Act, which applies to the whole of the United Kingdom, legal technicalities must be disregarded and the language of the Legislature must be taken in its popular sense. It would lead to strange confusion if an institution were taxed in Scotland which was exempt in England. Such a result could not have been intended by the Legislature. The Act of Elizabeth was enacted for England only, and has never been extended to Scotland. Nor has it to Ireland; and in Ireland the principle now contended for has been applied: *Attorney General* v. *Hope* (4). The respondent relies on *Attorney General* v. *Bagot* (5), but that case is irreconcileable with *Baird's Trustees* v. *Lord Advocate* (2). Taxing Acts must be construed strictly. If the person sought to be taxed comes within the letter of the law, he must be taxed however great the hardship may appear. An equitable construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute: see the judgment of Lord Cairns in *Partington* v. *Attorney General* (6); and that of Lord Blackburn in *Coltness Iron Co.* v. *Black* (7). Where the Income

(1) 2 S. & S. 594.
(2) 15 Sess. Cas. 4th Series, 682.
(3) 3 Macq. 659, 671.
(4) Ir. Rep. 2 C. L. 368.
(5) 13 Ir. C. L. Rep. 48.
(6) Law Rep. 4 H. L. at p. 122.
(7) 6 App. Cas. at p. 330.

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Tax Act intends to exempt particular institutions which are not charitable in the proper sense of the word, it specially provides for them; e.g. for literary and scientific institutions, public schools, &c.; and for the British Museum, which has a section (149) to itself. Those who inserted sect. 149 in the Act of 1842 must have known of the decision in 1826 with regard to the British Museum, and that section was unnecessary if, as the respondent contends, the Legislature intended the word "charitable" in the Income Tax Act to bear the larger meaning which it had been held to bear in the Mortmain Act. Again, the present trusts are for the benefit of foreign missions; whereas the intention in granting exemptions was to relieve the inhabitants of the United Kingdom.

Secondly, assuming that the allowances ought to be granted, mandamus is not the proper method of procedure. The Commissioners of Income Tax being Crown servants, no mandamus ought to issue: the proper remedy is by petition of right praying that the money in the hands of the Crown might be repaid: see the decision of the Court of Appeal in *In re Nathan* (1), overruling *R.* v. *Lords Commissioners of the Treasury* (2). The present case comes within that decision and is not governed by *Reg.* v. *Income Tax Commissioners* (3).

[The respondent's counsel were informed that they need not argue the question whether mandamus was the proper form of procedure.]

Crackanthorpe Q.C. and *Russell Roberts* for the respondent:—

The construction put by the appellants upon the Act is a very narrow one and is not consistent with the words of the section which express an intention to grant allowances on lands, &c. belonging to "any hospital, public school, or almshouse." If that construction be right trustees of public schools cannot claim the exemption; but it has been held that a public school which was partly maintained by fees charged for instruction was entitled to the allowance: *Blake* v. *Mayor of London* (4). The decision

(1) 12 Q. B. D. 461.
(2) 4 A. & E. 286.
(3) 21 Q. B. D. 313.
(4) 19 Q. B. D. 79.

of the Court of Appeal is justified both by the popular use of the word "charitable" and by the technical meaning given to it by English, Scotch and Irish statutes, and by judicial decisions in the three kingdoms. In popular language it is common to speak of gifts for religious or educational purposes as charitable. With regard to the technical meaning, so far as Ireland is concerned, the authorities are conclusive: see *Attorney General* v. *Bagot* (1) and the observations of Lord St. Leonards on the statute of Elizabeth and the jurisdiction of Courts of Equity in Ireland in cases of charity: *Incorporated Society* v. *Richards* (2). Lord St. Leonards there refers to an Irish Act, 10 Car. 1, sess. 3, c. 1, which deals with a great variety of endowments, inter alia for the building of churches, the maintenance of any minister and preacher of the Holy Word of God, the building and maintaining of bridges, "or for any other like lawful and charitable use and uses, warranted by the laws of this realm." That answers the alleged difficulty so far as Ireland is concerned; and see *Powerscourt* v. *Powerscourt* (3), citing *Lord Gort* v. *Attorney-General* (4). The only decision against the respondent's construction is *Baird's Trustees* v. *Lord Advocate* (5). That decision is, it is submitted, inconsistent with the language of Scotch Acts and with the administration of charitable trusts in Scotland. The Scotch statute of 1633 c. 6 speaks of "charitable works" as equivalent to pious and recognises gifts to the church for religious purposes as charitable gifts. And charitable trusts seem to have been administered by the Scotch Courts upon the same principles as those recognised by the English Court of Chancery: see the authorities cited by Fry, L.J. (6). Thus in England, Scotland and Ireland both the Legislature and the Courts have given to the word "charitable" a meaning which is not confined to the relief of poverty. The statute of 43 Eliz. c. 4 has been followed by several statutes which have given many instances of an extended use of the word "charitable," classing it with religious worship, education, and public objects: examples of which are found in 7 & 8 Wm. 3 c. 37, "An Act for the encouragement

(1) 13 Ir. C. L. Rep. 48.
(2) 1 D. & War. 298–325.
(3) 1 Molloy, 616.
(4) 6 Dow. 136.
(5) 15 Sess. Cas. 4th Series, 682.
(6) 22 Q. B. D. 312–314.

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of charitable gifts and dispositions," to promote "learning and other good and charitable works;" 2 & 3 Wm. 4 c. 115, which has a special application to Roman Catholics in Scotland, and speaks of "schools and places for religious worship, education and charitable purposes"; and 9 & 10 Vict. c. 59, an Act to relieve Jewish disabilities in respect to their "schools, places for religious worship, education and charitable purposes." The Charitable Trusts Act 1853 (16 & 17 Vict. c. 137) in sect. 66 defines "charity" as "every endowed foundation and institution taking or to take effect in England or Wales and coming within the meaning, purview, or interpretation of 43 Eliz. c. 4, or as to which, or the administration of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction"; and see sect. 62. By the Charitable Trusts Amendment Act 1855 (18 & 19 Vict. c. 124) s. 48 "charity" is to include every institution in England or Wales endowed for charitable purposes. And by sect. 28 stocks certified to be subject only to charitable trusts are to be exempt from income tax. The Legislature has thus recognised the construction put by the Court of Chancery and by the Act of Elizabeth upon the word "charitable." Still more significant is the Succession Duty Act 1853 (16 & 17 Vict. c. 51) which is a taxing Act and extends to the three kingdoms. Sect. 16 speaks of trusts for "charitable or public purposes," using "charitable" manifestly in the technical sense given to it by the Courts, and with regard to Scotland as well as England without any distinction. With regard to the authorities where "charity" and "charitable" have been judicially interpreted, it is enough to cite *Jones* v. *Williams* (1), where charity was defined as "a gift to a general public use which extends to the poor as well as to the rich," and a bequest of money, by sale of lands, to be applied in waterworks for the use of a town was held to be a public charitable use and void within the Statute of Mortmain, 9 Geo. 2, c. 36; and *Attorney General* v. *Brown* (2), where Lord Eldon held that a parliamentary grant of a duty on coal imported into a town, in aid of the pecuniary inability of the inhabitants to protect the town from the encroachments of the sea, was a gift to a charitable use; see also *In re Sinclair's*

(1) Amb. 651.

(2) 1 Sw. 265.

Trust (1); *Wilkinson* v. *Lindgren* (2); *Attorney General* v. *Vivian* (3); *Attorney General* v. *Webster* (4). As to the argument founded upon the special exemptions in favour of the British Museum and other institutions, those exemptions were no doubt inserted ex abundanti cautelâ. It is therefore submitted that whether the ordinary and popular sense of the word is regarded, or the legal and technical sense as used by the Legislature and defined by judicial decisions for a very long series of years, the narrower meaning should be rejected, and the term "charitable purposes" should be construed in the Income Tax Act as including at all events religious purposes. And for the present case this is all that need be established.

Sir *E. Clarke* S.G. replied.

The House took time for consideration.

1891. July 20. LORD HALSBURY L.C.:—

My Lords, in this case the Income Tax Commissioners have appealed against an order of the Court of Appeal, whereby a peremptory mandamus was awarded against them, commanding them to make an allowance and to grant a certificate of such allowance. If upon the merits of this case an allowance ought to be made and a certificate granted, I cannot doubt that the order of the Court of Appeal was right.

The statute under which the Commissioners are acting is peremptory in its terms to the Commissioners to make the allowance, and to give the certificates in cases where they are commanded to be given. If, therefore, the case is made out that the facts shew a case where the allowance ought to be made, and the certificate, which is merely consequential, should be given, there is a plain duty imposed by the statute on these executive officers, the neglect of which is properly enforceable by mandamus.

But the far more difficult question remains, whether the facts proved here establish the proposition that the case for the allowance is made out. That depends upon the true construc-

(1) 13 L. R. Ir. 150.
(2) Law Rep. 5 Ch. 570.
(3) 1 Russ. 226.
(4) Law Rep. 20 Eq. 483.

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tion of 5 & 6 Vict. c. 35, s. 61, No. VI., Sched. A., which is in these words:—

"No. VI. Allowances to be made in respect of the said duties in Schedule A.

"For the duties charged on any college or hall in any of the universities of Great Britain, in respect of the public buildings and offices belonging to such college or hall, and not occupied by any individual member thereof, or by any person paying rent for the same, and for the repairs of the public buildings and offices of such college or hall, and the gardens, walks, and grounds for recreation repaired and maintained by the funds of such college or hall:

"Or on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse, and not occupied by any individual officer or the master thereof, whose whole income, however arising, estimated according to the rules and directions of this Act, shall amount to or exceed one hundred and fifty pounds per annum, or by any person paying rent for the same, and for the repairs of such hospital, public school, or almshouse, and offices belonging thereto, and of the gardens, walks, and grounds for the sustenance or recreation of the hospitallers, scholars, and almsmen, repaired and maintained by the funds of such hospital, school, or almshouse, or on any building the property of any literary or scientific institution used solely for the purposes of such institution, and in which no payment is made or demanded for any instruction there afforded, by lectures or otherwise; provided also that the said building be not occupied by any officer of such institution, nor by any person paying rent for the same:

"The said allowances to be granted by the Commissioners for General Purposes in their respective districts:

"Or on the rents and profits of lands, tenements, hereditaments or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes:

"The said last-mentioned allowances to be granted upon proof before the Commissioners for Special Purposes of the due

application of the said rents and profits to charitable purposes only, and in so far as the same shall be applied to charitable purposes only:

"The said last-mentioned allowances to be claimed and proved by any steward, agent, or factor, acting for such school, hospital, or almshouse, or other trust for charitable purposes, or by any trustee of the same, by affidavit to be taken before any Commissioner for executing this Act in the district where such person shall reside, stating the amount of the duties chargeable, and the application thereof, and to be carried into effect by the Commissioners for Special Purposes, and according to the powers vested in such Commissioners, without vacating, altering, or impeaching the assessments on or in respect of such properties; which assessments shall be in force and levied notwithstanding such allowances."

The main debate turns upon whether the lands here are vested in trustees for charitable purposes, though the whole enactment is not without its importance in considering what is the extent of its application.

The particular dispositions which give rise to the dispute are sufficiently set forth on page 2 of the appellants' case as follows: "4. Under an indenture dated the 11th day of February 1813 certain lands, tenements, and hereditaments (hereinafter referred to as lands) in the county of Middlesex, are conveyed by one Elizabeth Mary Bates, to certain trustees upon trust after payment of costs and outgoings to apply the annuities, rent-charges, yearly issues, and profits (all of which are hereinafter referred to as rents and profits) of the said lands as follows:—that is to say: (1.) As to two equal fourth parts thereof, for the general purposes of maintaining, supporting, and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, known by the name of Unitas Fratrum, or United Brethren (which Protestant Episcopal Church is hereinafter referred to as the said Church). (2.) As to another equal fourth part, towards the maintenance, support, and education of the children of ministers and missionaries educated at the school and academy at Fulner, near Leeds, special regard being had to the children of such ministers as are least able to support the

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expense of their children's education, or for the benefit and purposes of any similar school, academy, or establishment elsewhere within the United Kingdom. (3.) As to the remaining equal fourth part or residue, for the maintenance and support of certain establishments appertaining to the said Church for single persons, called choir-houses, within the United Kingdom.

"5. Under another indenture dated the 25th day of July 1815 certain freehold estates (also hereinafter referred to as lands) in the county of Middlesex, are conveyed by the said Elizabeth Mary Bates to certain trustees upon trust, after the payment of costs and outgoings, to apply the residue or surplus of the rents and profits of the said lands for the benefit and general purposes of a certain settlement or establishment of the said Church, existing at Gracehill, Ballymena, in the county of Antrim, and the dependencies of the said settlement or establishment as long as the same shall exist as a Congregational settlement of the said Church."

Whether these dispositions, or any of them, are charitable purposes, within the meaning of the exemption I have quoted above, must be determined upon a consideration of what those words "charitable purposes" mean in the exemption in question.

Now, before proceeding to discuss the words themselves, I somewhat protest against the assumption that the alternative is to be between a popular and what is called a technical meaning, unless the word "technical" itself receives a construction different from that which is its ordinary use. There are, doubtless, some words to which the law had attached in the stricter sense a technical meaning; but the word "charitable" is not one of those words, though I do not deny that the old Court of Chancery, in enforcing the performance of charitable trusts, included in that phrase a number of subjects which undoubtedly no one outside the Court of Chancery would have supposed to be comprehended within that term. The alternative, therefore, to my mind may be more accurately stated as lying between the popular and ordinary interpretation of the word "charitable," and the interpretation given by the Court of Chancery to the use of those words in the statute of 43 Elizabeth.

My Lords, to quote from the language of Tindal C.J. when

delivering the opinion of the judges in the *Sussex Peerage Case* (1): "The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Dyer C.J. (*Stowel* v. *Lord Zouch* (2)), is a key to open the minds of the makers of the Act, and the mischiefs which they are intended to redress."

Now, I think, it is very material to consider what was the intent of Parliament in passing 43 Elizabeth. That Act itself is intituled, "An Act to redress the misemployment of lands, goods, and stocks of money heretofore given to charitable uses." And after reciting the objects with which certain lands and stocks had been limited, appointed, and assigned, it recites that the said lands, tenements, rents, and so forth, nevertheless had not been employed according to the charitable intent of the givers and founders thereof by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same. For redress and remedy whereof, Be it enacted, &c. It then proceeds to create the tribunal and machinery for the restoration of the property so misemployed.

My Lords, it is very intelligible to my mind that the Court of Chancery, or any Court, should have given the widest possible interpretation to an Act intended to remedy such abuses. The enumeration of charitable objects in the preamble of the statute was very soon interpreted not to be limited to the exact charities therein referred to. Where a purpose by analogy was deemed by the Court of Chancery to be within its spirit and intendment, it was held to be "charitable" within the meaning of the statute. In *Jones* v. *Williams* (3) "charity" is defined to be "a general

(1) 11 Cl. & F. at p. 143. (2) Plow. at p. 369.
(3) Amb. 651.

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public use." See also the case of *Thomson* v. *Shakespear* (1), where Lord Campbell, Knight-Bruce L.J., and Turner L.J. (though in the particular case, and for reasons beside the present controversy, they decide against the validity of the gift) shew what width of interpretation in their view may be applied to the words "charitable use." Thus also "paving, lighting, cleansing and improving a town," have been held to be within the equity of the Statute of Elizabeth and "charitable." To build a house of correction or sessions house is a charitable purpose: Duke, 109, 136; *Attorney General* v. *Heelis* (2). Also to found a botanical garden. A fund for the establishment of lectures against cruelty to animals is a "charitable use." A gift "to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country, Great Britain" (*Nightingale* v. *Goulbourn* (3)) is a "charitable purpose": see also *Thelluson* v. *Woodford* (4).

In these and many like cases it appears to me that the distinction between what is charitable in any reasonable sense, and that to which trustees for any lawful and *public* purpose may be compelled to apply funds committed to their care, has been—I will not say confused—but so mixed that where it becomes necessary to define what is in its ordinary and natural sense "charitable" what is merely public or useful is lost sight of. And, indeed, for the purposes for which the Court was then enforcing the performance of the trusts it is intelligible that such distinctions should be disregarded.

If it is never necessary to distinguish between such heads as "religious," "parochial," "educational," but if all public purposes whatsoever which the law would support and the Court of Chancery enforce are in all statutes to be comprehended within the phrase "charitable," then the question is easily solved; but I do not think any statute or any decision has ever countenanced such a proposition.

It is argued that the phrases "charitable trusts" and "charitable purposes" have always received the same construction in Ireland to which the Act 43 Eliz. does not extend, and that

(1) 1 D. F. & J. 399.
(2) 2 S. & S. 67, 76.
(3) 2 Ph. 594.
(4) 4 Ves. 235.

therefore apart from the particular statute it has, so to speak, a technical and legal meaning in the law.

I think the argument is not sound; the statement of fact on which it rests is literally accurate, but misleading, inasmuch as between 43 Eliz. (1601) and 10 Charles 1 (1634) there is very little authority obtainable as to what the views of the Irish Courts were during that interval; and from that date the Irish Act, 10 Charles 1, certainly established what I will call the statutable meaning of those words as applicable to the subject-matter with which it dealt just as much as 43 Eliz. To shew that I am not overstating the identity of the statutes in question in their scope and object, it may be worth while to quote the language of Lord St. Leonards, in the case of the *Incorporated Society* v. *Richards*. (1) In delivering judgment as Lord Chancellor of Ireland, he observed: "I minutely compared the two Acts, placing the charitable uses enumerated in one in juxtaposition with those to be found in the other; and I find very little difference between them. Thus the Statute of Elizabeth speaks of relief to aged, impotent, and poor people; the maintenance of sick and married soldiers and mariners; it enumerates a list of such cases, whilst that of Charles has those comprehensive words 'or for the relief or maintenance of any manner of poor, succourless, distressed, or impotent persons.' It would be difficult to shew that any one of the particular charities set forth in the Act of Elizabeth is not included within those general words. Again the Statute of Elizabeth speaks of 'schools of learning, free schools and scholars of universities;' whilst that of Charles is thus expressed; 'for the erection, maintenance, or support of any college, school, lecture in divinity, or in any of the liberal arts or sciences.' The Act of Charles in this respect goes beyond that of Elizabeth, for the latter does not comprise in words 'the liberal arts and sciences.' Then the Act of Elizabeth recites those gifts which had been or might be made for the repair of bridges, &c.; 'some for repairs of bridges, ports, havens, causeways, churches, seabanks, and highways'; and I find in the Statute of Charles mention made of similar gifts, not as in the other, collected all together, but in different parts; thus:

(1) 1 D. & War. at p. 324.

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'for the building, re-edifying, or maintaining in repair of any church, college, school, or hospital'; and in another place, 'for the erection, building, maintenance, or repair of any bridges, causeyes, cashes, paces, and highways, within this realm.' The Act of Charles also provides 'for the maintenance of any minister and preacher of the Holy Word of God,' which was purposely omitted in the Statute of Elizabeth (Duke, 125). After this the general words of the Act of Charles are, 'or for any other like lawful and charitable use and uses, warranted by the laws of this realm.' The Statute of Charles seems, therefore, an almost exact pattern of the Statute of Elizabeth, and I have but little doubt, that its framers had the latter Act before them at the time they were preparing it."

Then it is said that these exemptions have been allowed for a long period; that is true, but I am not able to assent to the view that the course pursued by the executive officers of the Crown is one which, under the circumstances of this case, could afford any clue to the true construction of the statute.

I do not deny that, in the language of Cockburn C.J.: *Feather* v. *The Queen* (1) "where there has been an exposition of the law by judicial decision, or a settled course of practice or understanding of the law among legal practitioners, the language of an instrument" (or of a statute) "may in certain cases be interpreted according to such a standard." Take the case there referred to. I quote from the statement of facts by the Chief Justice (p. 289): "It certainly appears that at the time this patent was granted a general understanding prevailed, founded on the practice of a long series of years, that if patented inventions were used in any of the departments of the public service the patentee would be remunerated by the ministers or officers of the Crown administering such departments, as though the use had been by private individuals. There can be no doubt that in numerous instances payments had been made to patentees for the use of patented inventions in the public service without objection or difficulty; and not only does no question appear to have been raised as to the right of the patentees by the ministers of the Crown, but the legal advisers of the Crown appear also to have considered the

(1) 6 B. & S. at p. 290.

right, whether arising from the terms of the patent or from the existing practice, as so well settled that we find Sir John Jervis the then Attorney General, on an application for the renewal of the patent of *Pettit Smith* (1), before the Judicial Committee of the Privy Council in the year 1852, two years only before the date of this patent, endeavouring to obtain the insertion of a condition that the Crown should have the use of the invention without payment; a course which obviously would have been unnecessary if the Crown had been considered entitled to use the invention without such a provision. That the same view of the matter has prevailed until the present question was raised in this case and that of *Clare* v. *The Queen* which immediately preceded it, is plain, as we find a similar application to that made by the Attorney General in the case of *Smith's Patent* repeated in the subsequent cases of *Carpenter's and Lancaster's Patents*, the application for the renewal of the latter having occurred as late as in the last year. There can be little doubt that on the faith of the understanding and practice referred to many inventors have, at a great expense of time and money, perfected and matured inventions and taken out patents in the expectation of deriving a portion of their reward from the adoption of their inventions in the public service."

And yet notwithstanding this they held that the patent would not be construed in pursuance of such a practice. Or to put the limitation a little higher, as it is put by Lord Ellenborough in *Isherwood* v. *Oldknow* (2), "where the general understanding of the law has not been speculative and theoretical, but where it has been made the groundwork and substratum of practice" (such as in the case with which he was dealing) "upon which powers of the character then in debate had been erected and acted upon from the time of Henry VIII. down to 1815."

I think it would be impossible to say that anything in the history of the administration of the Income Tax Act comes up to the standard required, even apart from the history of how the practice of allowing the exemption in debate had grown up.

As a matter of fact we know that the practice is directly in conflict with the opinion given by the law officers of the Crown,

(1) 7 Moo. P. C. C. 133.

(2) 3 M. & S. at p. 397.

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Sir Alexander Cockburn and Lord Westbury, when respectively Attorney and Solicitor General, in the year 1856, who advised that "charitable purposes" were plainly distinguishable from "parochial purposes" in the Income Tax Acts, and accordingly advised against exemptions which certainly in the Court of Chancery would have been considered "charitable." We know also that the origin of the allowance was founded on the opinion of Mr. Fuller, to whom was assigned the duty of superintending the business relating to the claims of charities for exemption in the year 1843.

The opinion given in 1856 does not appear however to have been acted on, since by a letter from the Treasury to the Commissioners of Inland Revenue, dated October 1, 1863, it was laid down that, notwithstanding the opinion of the law officers, the administration of the tax ought not to be altered by a purely administrative authority. All this appears from a Return made to an order of the House of Lords, dated August 3, 1888. But I confess I should regard with very great hesitation any inference derivable from the parliamentary paper in question, except the inference which negatives a universal and adopted practice as expounding the law.

I cannot therefore agree that the statute receives any exposition from the fact that the practice has been such as has been described. I also think the true view of the construction of an Act which is to apply to England, Ireland, and Scotland alike, is, that it ought to be construed according to the canon of construction laid down by the Court of Session in the case of *Baird's Trustees* v. *Lord Advocate* (1). It is a rule which has been acted on, not only in respect of Taxing Acts, but of other enactments. Indeed, it is only part of a general principle of common sense which Mr. Justice Grose laid down in a rating case: *R.* v. *Hogg* (2), "a universal law cannot receive different constructions in different towns." And if (to quote the language of Lord Justice Fry), words construed in their technical sense would produce inequality, and construed in their popular sense would produce equality, you are to choose the latter. I should hesitate very much to qualify this rule of construction by

(1) 15 Sess. Cas. 4th Series, 682. (2) 1 T. R. 728.

pointing to instances in which inappropriate words had been used in a statute. That, in fact, the language of an Act of Parliament may be founded on some mistake, and that words may be clumsily used, I do not deny. But I do not think it is competent to any Court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a Court of Law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said, and I think any other view of the mode in which one must approach the interpretation of a statute, would give authority for an interpretation of the language of an Act of Parliament, which would be attended with the most serious consequences.

I am not satisfied, after fully considering the statutes and decisions which the care of my noble and learned friend, Lord Watson, has collected for our guidance, that the principle of the decision of the Court in the case of Baird's trustees is not quite reconcilable with all of them. That "godly" and "pious" are convertible terms, and may be so treated, is true. And, with reference to the subject-matter of the decisions to which my noble friend has referred, it is to be observed that the supply of education, or the relief of poverty, largely entered into the purpose referred to, and that the question then in debate did not raise the question now before your lordships. In no one of them do I find such a latitude of interpretation of "charitable purposes" as those which I have quoted, as being within the contemplation of the English Court of Chancery "charitable purposes," and they are also open to an observation of a more general character, which I shall have to make presently when dealing with the particular donation now before your lordships for consideration.

In common with the Court of Appeal, I think that the principle laid down by the Court of Session in construing an Act which is to apply to the three kingdoms, is a sound one, though perhaps verbal criticisms may be applied to the language in which it is conveyed. Lord Campbell's observation in the case of *Lord Saltoun* v. *Lord Advocate* (1), I think is the true rule; though

(1) 3 Macq. 659.

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even there, perhaps, criticism might be applied to the exact language in which it is expressed.

I cannot concur with the view which has found favour with one of your lordships, that the technicalities which Lord Campbell thought were to be disregarded were not technical expressions in the Act. The word which was in debate was "predecessor," and whether that word was to receive its meaning according to technical application in Scotch law, or its more popular meaning, was the turning point of the case; and it was with reference to the use of that word "predecessor" that Lord Campbell's observations were made. Neither do I think one gets much light from the case of Gordon of Park, where, by the Act of Union itself it was ordained "that the law of treason should be administered as much as possible alike in the two countries." That Act, therefore, recognised that differences did exist, and enacted in somewhat loose phraseology that they were to be administered "as much as possible alike."

I do not find that in any Scottish Act, or in any Scottish decision, "institutions for general public purposes," "protection of animals," "extension of knowledge," "museums," "libraries," or the like, "diffusion of geographical knowledge," "homes for lost dogs," or "anti-vivisection" societies, would be treated in Scotland as the objects of charitable donation, and the argument involves the necessity of establishing, not that there are points in which the English and Scottish use of that word may be similar, or even identical, but that generally, and in the Scotch and English law, they must have practically the same meaning. I should hesitate very much to differ from the Court of Session on that subject, and certainly there is nothing which has been brought before your lordships during the argument which to my mind justified the proposition that the use of the words "charitable purposes" in the Court of Chancery, which, as I have pointed out, comprehends all the above objects, has ever been adopted in the law of Scotland. I admit the justice of the criticism which suggests that words are sometimes put into an Act ex abundanti cautelâ, and would not therefore rely upon mere redundancy of expression, which I agree may be inserted for securing some particular institution

which it is thought might otherwise be deprived of such statutable exemption; but I do not think that the same observation applies to a series of statutes in which "charitable" is distinguished from "public" purpose, or religious, or educational, as indeed is the case in the statute upon which most reliance is placed (16 & 17 Vict. c. 51), where the words are "charitable *or* public purposes." I do not deny the validity as an argument of the drafting of that clause, which having described the property as subject to a trust for "charitable" or "public" purposes, and having all through the clause spoken of "such" property, finally speaks of it as "the charity" property, a phrase in itself not quite accurate; but I agree that if a question were to arise whether there was the power of securing the amount of duty upon the property, the subject of a trust for "public" or for "charitable" purposes, any Court would construe the words "charity property" as being comprehended within the intended power to charge; but it would be rather upon the construction of the whole section, than that the words themselves import an identity between the words "charitable" and "public." The fact however remains, that in various statutes the word "charitable" is distinguished by the legislature from "public," "educational," "religious;" and, in no one instance that I have been able to find, do the words run "or *other* charitable purpose," which one would think would be the natural mode of expressing the meaning now insisted on. One can understand the good sense of the effort to give the widest interpretation to such a phrase as "charitable uses," as in the English and Irish statutes, or the words "pious donations" of the Scottish Statute of 1633. The evil was the same in all three countries, viz.: the misapplication of donations made for the benefit of people who could not be represented by any particular litigant, and whose interests were neglected by the dishonest appropriation of gifts intended for useful, public, or charitable purposes. But such considerations have no application to a Taxing Act. There is no purpose in a Taxing Act but to raise money, and an exemption is just as much within this criticism as any other part of the Act, since every exemption throws an additional burden on the rest of the community.

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It is suggested, indeed, that the reason for an exemption may be that the public nature of the interest is that which may justify the exemption. I cannot find any trace of such a principle in the statute, and I do not think it is borne out by decisions where the incidence of rates has been in question. It was undoubtedly thought that property held for public purposes was not rateable; but this is now clearly not the law. It is settled that no such exemption applies: see *Mersey Docks* v. *Cameron* (1); *Clyde Navigation Trustees* v. *Adamson* (2); *Commissioners of Leith Harbour and Docks* v. *Inspector of the Poor* (3).

The construction of a Taxing Act appears to me to present no analogy to the class of Acts, English, Irish, or Scotch, to which I have above referred, and I cannot apply to this Act the principle of construction which those Acts may very justly have received.

To come now to the particular bequests before us, and to the use of the word "charitable" in the particular Act we are construing, I would say, without attempting an exhaustive definition or even description of what may be comprehended within the term "charitable purpose," I conceive that the real ordinary use of the word "charitable" as distinguished from any technicalities whatsoever, always does involve the relief of poverty. No one would doubt what was the meaning of a charity sermon, a charity school, or of a person giving service gratuitously because it was for a charity. And it seems to me that the Court of Appeal did not so much differ with the Lord Chief Justice as to the true exposition of the word involving the relief of poverty, as in the application of the proposition, What would be a relief of poverty? And as to that, I think it would be impossible to give an adequate exposition of what would presumably be in the mind of the Legislature, without regarding the circumstances of the time, and the state of public feeling when the legislation in question was under debate. At a time, for instance, when religious instruction was regarded as being as important as the maintenance of life, then if people were without the means of obtaining religious instruction, one can well

(1) 11 H. L. C. 443. (2) 4 Macq. 931.
(3) Law Rep. 1 H. L., Sc. 17.

understand the principle that to give them the necessary religious instruction, which the argument assumes they would not otherwise be able to obtain, would be in the sense which I have indicated "charitable."

But the difficulty I have in reconciling the decision of the majority of the Court of Appeal with the principle they have laid down is that in the particular gift under debate, purposes appear to be contemplated, having no relation to poverty at all. Take the first case of foreign missions: I suppose the conversion of the wealthiest chieftain to the views of the Moravian Mission would be just as much within the object of the trust as any other purpose.

The Master of the Rolls whilst enlarging the purposes which may be described as charitable, beyond the mere relief of physical necessities, as to which I do not disagree, adds these words:—"You may desire to convert the richest people, and very often do. If you desire to convert them to your religious opinions, whatever they may be, not on account of their poverty, but because you think it is desirable that their religious views should be like yours that does not come within this canon. A religious object is not necessarily a charitable object within the sense that I have put it." With that view I entirely concur, and, as I have said, the difficulty I have is in applying such a rule to justify the exemption here claimed. I do not understand how it can be said that this trust is only for a mission to convert simply poor heathens. It seems to me (to use the language of the Master of the Rolls himself) "a mission to convert heathens without regard to their poverty at all." And it is to be remembered that, so far as the property is entitled to exemption, it must not only be applicable to but applied to the charitable purposes in favour of which the exemption is claimed. I think it would be a surprise to the Moravian body itself to find that their missions were either exclusively or substantially applied only to impoverished heathens, and that heathens well off in their own country were beyond the scheme of their missions. To my mind it is obvious that the object of the mission is the propagation of the Moravian tenets among persons whom the Moravian Brethren conceive to be in darkness, and whom they

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wish to enlighten by the views which they themselves profess, and that the element of poverty, as applicable necessarily to the objects of their efforts, is as much beside the Moravian view as the colour of the converts or the situation of the territory.

That there are some objects which would be charitable objects under these trusts, I do not deny; but the question here argued is whether the funds are *all* applicable *and applied* to charitable purposes.

For these reasons I am of opinion that the judgment appealed from ought to be reversed.

LORD WATSON:—

My Lords, by indenture executed in 1813 and 1815, Mrs. Elizabeth Mary Bates settled real estate in England upon trust for purposes connected with the church of the United Brethren, commonly known as Moravians. The larger share of the trust income is appropriated to the support of the missionary establishments of the church among heathen nations. The other objects of the trust are (1) the maintenance and education of children of ministers and missionaries, special regard being had to the children of those ministers who are least able to bear the expense, and (2) the choir houses of the church, which provide homes for female teachers who have become incapacitated for work, for widows of ministers, missionaries, and poor members, and also for single men engaged in attending to the young and assisting in their education.

Down to the year 1886, income tax upon the annual value of the trust estate was paid in the first instance by their tenants, and was then repaid to the trustees, under the enactments of Sched. A. Rule VI., of 5 & 6 Vict. c. 35, which provides that, in charging duty, allowances shall be granted in respect of "the rents and profits of lands, tenements, hereditaments, or heritages, belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes." An application made to the appellants for allowance of the tax for the year ending 5th of April, 1886, which had been paid by the tenants, was rejected upon the ground that the purposes to which the trust

income is appropriated and applied do not bring it within the scope of these exemptions. In consequence of their refusal, the respondent, who is treasurer of the Church of the United Brethren, upon the 12th of April, 1888, obtained an order nisi for a writ of mandamus to compel the appellants to grant the allowance, and with that view, to give a certificate, with an order for repayment in terms of the statute. It does not seem to admit of serious dispute that, if the purposes of Mrs. Bates' Trust are "charitable purposes" within the meaning of the Act of 1842, the appellants have declined to perform their statutory duty, and a mandamus must issue.

Had 5 & 6 Vict. c. 35 been an English statute the present controversy would, in all probability, never have arisen. The expression "charitable purposes" is commonly, if not invariably, used, both in English law and English legislation, in a sense wide enough to include the missionary enterprises and the choir houses of the Unitas Fratrum, as well as the maintenance and education of the children of its ministers and missionaries. But the Act applies to Scotland as well as to England; and the argument of the appellants in the Courts below, and at your Lordships' Bar, has been founded on the assumption that in Scotch law the expression cannot, according to any legitimate construction, include the objects of Mrs. Bates' Trust settlements. That proposition is not without some authority to support it; and hence the difficulty which the Courts below have experienced in dealing with the present case.

The statutory words of exemption upon which the result of this appeal depends were, for the first time, made the subject of judicial interpretation in *Baird's Trustees* v. *Lord Advocate* (1) which was decided by the First Division of the Court of Session in 1888. The truster in that case had directed that the funds settled by him, amounting to half a million sterling, should be expended for the support of objects and purposes in connection with the Established Church of Scotland, all of a religious character, and for the aid of institutions having the promotion of such purposes in view; his desire being to mitigate spiritual destitution among the poor and working population of Scotland,

(1) 15 Sess. Cas. 4th Series, 682.

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through efforts for securing the godly upbringing of the young, the establishing of parochial pastoral work, and the stimulating of ministers and agencies of the Church to sustained devotedness in the work of carrying the Gospel to the homes and hearts of all. The Inner House, affirming the judgment of the Lord Ordinary (the late Lord Fraser), held that the income of heritable estate vested in the trustees for these purposes was not within the statutory exemption.

The learned judges of the Court of Session refused to attach to "charitable purposes" the comprehensive meaning which the words admittedly bear in English law, being of opinion that they have no technical significance in the law language of Scotland. Accordingly, they held that in the Act of 1842, which is an Imperial statute, the words must be read in their ordinary and popular acceptation. The meaning of the words, when interpreted in that sense, was thus defined by the Lord President (Inglis): "Charity is relief of poverty, and a charitable act or a charitable purpose consists in relieving poverty, and whatever goes beyond that is not within the meaning of the word 'charity' as it occurs in this statute." Lord Shand, adopting a still narrower definition, said: "I think it (i.e., the statutory exemption) relates to funds dedicated to the relief of physical necessity or want; to funds given as alms, or as a provision for the relief of persons from physical privations or suffering arising from poverty, and that it goes no farther." Lord Adam, in agreeing with his brethren, observed: "It appears to me to be quite impossible to extend the term 'charitable purposes,' used in this Act, so as to cover religious purposes."

In this case Lord Coleridge C.J. adopted the same construction of "charitable purposes" which had commended itself to the Court of Session. Grantham J. dissented, upon the ground apparently that the Government by which the Act was introduced, and its successors in office, had, for more than forty years, invariably construed the words in the sense of English law, and allowed the exemptions which are now in dispute. In these circumstances the opinion of the senior judge prevailed, and the order nisi of the 12th of April 1888 was discharged by the Divisional Court; but in the Court of Appeal that judgment

was unanimously reversed, and it was decreed that a peremptory mandamus should issue to the effect specified in the respondent's original application.

Lord Esher M.R. and Lopes L.J. recognised the authority of *Baird's Trustees* v. *Lord Advocate* (1) as settling that, in Scotland, the term "charitable purposes" has not the meaning which is attributed to it by English Courts. They therefore discarded that meaning; but in determining what, in a popular sense, constitutes a "charitable purpose," they adopted a much more liberal definition than the learned judges of the Court of Session. They held that, in its ordinary acceptation, "charity" comprehends all benefits, whether religious, intellectual, or physical, bestowed upon persons who, by reason of their poverty, are unable to obtain such benefits for themselves without assistance. Fry L.J. did not accept the authority of the decision in the case of *Baird's Trustees* (1), and came to the conclusion that the words "trusts for charitable purposes" have, for all practical purposes, the same legal significance in Scotland as in England or Ireland.

If I could accept, without reserve, the opinions expressed in *Baird's Trustees* (1) with respect to the meaning of the term "charitable," I should still entertain doubts as to the rule applied to its decision, which has been followed in this case by the majority of the English judges. The only principle derivable from *Lord Saltoun* v. *Lord Advocate* (2), which can aid in the decision of this case, appears to me to be this—that the Act of 1842 must, if possible, be so interpreted as to make the incidence of its taxation the same in both countries. In that case the language which the Court had to construe, which was not technical, had, when read in the light of the context, the effect of producing the equality which the legislature presumably contemplated. But there existed outside the Act a technical rule of Scotch feudal conveyancing, which would, if permitted to qualify the language of the Act, have disturbed that equality; and this House held, reversing the judgment of the Court of Session, that an extrinsic technicality productive of that result ought to be disregarded. It does not, in my opinion, necessarily

(1) 15 Sess. Cas. 4th Series, 682. (2) 3 Macq. 659.

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follow from that decision that the popular meaning of a word employed in a taxing statute must be adopted, in cases where the word has a definite legal meaning in England and no definite popular meaning either in England or Scotland. I have been unable to find that the word "charitable," taken by itself, has any well-defined popular meaning in Scotland or elsewhere. It is a relative term, and takes its colour from the specific objects to which it is applied. Whilst it is applicable to acts and objects of a purely eleemosynary character, it may with equal propriety be used to designate acts and purposes which do not exclusively concern the poor, but are dictated by a spirit of charity or benevolence. In the latter sense the meaning of the term is practically, although not absolutely, co-extensive with that which has been attributed to it by the Courts of Chancery. Assuming, as the Court of Session has decided, that the term has no technical meaning in Scotch law, ought "charitable," as it occurs in the Act of 1842, to receive that wide yet legitimate popular interpretation which practically harmonises with its import in English law, or must its narrowest conventional use be accepted as matter of fixed legal construction? I have not found it necessary for the purposes of this case to determine these questions, because I am satisfied that, in legislative language, at least, the expression "charitable" has hitherto borne a comprehensive meaning according to Scotch as well as according to English law. On this point I have the less hesitation in differing from the learned judges of the Court of Session, because I do not find that the considerations which have led me to that conclusion were entertained by them, or were even submitted to them in argument.

So far as I am able to discover, "godly" and "pious" as applied to trusts or uses, had, in early times much the same significance in Scotland as in England. Their meaning was not limited to objects of a religious or eleemosynary character, but embraced all objects which a well-disposed person might promote from motives of philanthropy. For instance, the Scotch Act, 1592, c. 162, applies the epithet "godly" to a gift by Queen Mary of lands and annual rents for sustentation of the ministry within the burgh of Edinburgh and the entertainment of its

hospitals. The extensive signification of "pious" may be illustrated by the terms of the Act 1685 c. 18, which deprived patrons of their right to stipend accruing during the vacancy of a cure, and enacted that it should in future be employed by them "on pious uses within the respective parishes." Of these pious uses three are "more particularly" specified, these being "the building and repairing of bridges, repairing of churches or entertainment of the poor." In the case of *Lord Saltoun* v. *Lady Pitsligo* (1) the Court of Session held that the repair of a public harbour was a pious use within the meaning of the Act, although they disallowed the patron's outlay on the ground that the harbour was beyond the limits of the vacant parish.

The expression "charitable," which is used in the Act of Elizabeth as a synonym of "godly," is employed in the same sense with "pious" in the Scottish Statute 1633 c. 6 which is entitled an Act against "the inverting of pious donations." It proceeds on the preamble that certain gifts in lands, heritages, and sums of money, "in favour of colleges, schools, hospitals, and other pious uses," had been inverted to other purposes, "to the evil example of others and the hindrance of such and *the like charitable works* against all reason and conscience." It accordingly enacts that such inversions shall cease; and that action shall be competent to the "said kirks, colleges, and others," and to "the bishops and ordinaries within the dioceses where the said kirkes, schools, and others lye," against the heirs, executors, or others entrusted with the administration of the gift; and also provides that on application to the Court letters of horning shall issue without citation of parties.

According to the plain language of the Act of 1633, all donations for pious purposes, including gifts made to the Church for religious purposes, were regarded as charitable donations. I see no reason to doubt that the word "charitable" was so used in its ordinary and legal sense, or that Mr. Baird's trust would have been considered a trust for charitable purposes by the legislators who passed the Act. If the Income Tax statute of 1842 had been enacted by the Scottish Parliament in 1633, I do not think the Lords of Session would at that time have adopted the narrow

(1) M. Dict. 9948.

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construction put upon the word "charitable" by their successors in the year 1888.

The use of the word in the early law of Scotland, or in statutes of the Scottish Parliament, would, no doubt, be of little relevancy to the present question, if it could be shewn to have acquired a more restricted meaning in the modern law language of that country. The reported decisions of the Court of Session throw little, if any, light upon the question, for a reason which is sufficiently obvious. Ever since its institution the Court has exercised plenary jurisdiction over the administration of all trusts, whether public or private, irrespective of the particular purposes to which the estate or income of the trust may be appropriated, and there has consequently been no room for those numerous questions, as to a trust being charitable or not, which have arisen in England under the statute of Elizabeth. Whilst the Scotch cases cannot be said to afford any precise definition of what constitutes a charitable trust purpose, some of them do appear to point to a more liberal interpretation than that which was adopted by the Court in the case of the Baird trust. In *Ferguson* v. *Marjoribanks* (1), which was decided in 1853, a testator had bequeathed a sum of money to trustees, with directions to apply the annual interest "in the erection of a free school in such part of the parish of Bathgate as my said trustees or the major part of them shall think fit and proper, for the education of the youth of the said parish." The benefits of the foundation were not confined to the poor, nor could they reasonably be said to be in the main intended for the poor. Yet the Lord President McNeill (afterwards Lord Colonsay) describes the bequest as one "in perpetuity for a charitable purpose;" and, in the note appended to his judgment as Lord Ordinary, Lord Rutherfurd, the most learned Scotch lawyer of the period, speaks of it as "the charity."

In this House, noble and learned Lords, in disposing of appeals from Scotland, have expressed themselves in terms which point in the same direction. Lord Gifford, delivering judgment in *Hill* v. *Burns* (2), uses the expression "charitable" as equivalent to "charitable and benevolent." In *University of Aberdeen* v.

(1) 15 Sess. Cas. 2nd Series, 637. (2) 2 W. & S. 80.

Irvine (1), a trust for college bursars, who did not necessarily belong to the class of indigent persons, was dealt with as a charity, and the rules prevalent in England in cases of charitable trusts were applied to its decisions. On the other hand, in *Magistrates of Dundee* v. *Presbytery of Dundee* (2), where the trust under consideration was chiefly for the sustentation of ministers of the Established Church, the words "charity" or "charitable" do not occur in the judgments delivered by the House. I do not lay great stress on these authorities, or upon the decisions of this House which were cited at the bar in *Clephane* v. *Lord Provost and Magistrates of Edinburgh* (3), and similar cases, because in the latter class the main objects of the trust consisted in ministering to the wants, physical or educational, of the really poor, and in neither class was the meaning of the word "charitable," in Scotch law, an issue distinctly raised for the determination of the House. At the same time it does appear to me to be a relevant observation that Scotch trusts, which are ejusdem generis with trusts falling within the statute of Elizabeth, are charitable in this sense, that they are all governed by the same rules which are applicable to charitable trusts in England.

If the cases to be found in the books afforded the only material for determining the meaning of "charitable" in a statute applicable to Scotland, they might be insufficient to warrant the conclusion which I have come to. But these authorities appear to me to go this length. In the first place, they establish positively that charity is not limited to relief of the physical wants of the poor, but includes their intellectual and moral culture; and, in the second place, they suggest very strongly that purposes which concern others than the poor may nevertheless be charitable purposes in the sense of Scotch law. They do not contain any definition of the word "charitable," yet they do not, by any fair inference, exclude the legal meaning attached to it in the old Scotch statutes. The matter does not rest there, because, in British statutes applicable to Scotland in which the words "charity" and "charitable" occur, they are employed in the wider sense in which they were used by the Scottish Parliament.

(1) Law Rep. 1 H. L., Sc. 289. (2) 4 Macq. 228.
(3) 4 Macq. 603, and Law Rep. 1 H. L., Sc. 417.

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In the year 1832 a statute was passed, intituled, "An Act for the better securing the *charitable donations and bequests* of His Majesty's subjects in Great Britain professing the Roman Catholic religion." The first section, which recites that doubt had been entertained whether it was lawful for Roman Catholics in Scotland to acquire and hold in real estate the property necessary "for religious worship, education and charitable purposes," enacts that His Majesty's subjects professing the Roman Catholic religion in respect to their schools, places for religious worship, education and charitable purposes, in Great Britain, and the property held therewith, and the persons employed in or about the same, shall in respect thereof be subject to the same laws as the Protestant Dissenters are subject to in England in respect to their schools and places for religious worship, education and charitable purposes, and not further or otherwise." Comment upon that language is almost superfluous. "Charitable" is used in the same comprehensive sense with reference to England and Scotland alike. According to the title of the Act, donations and bequests for the promotion of any of the objects specified in the first clause, including education and the maintenance of public worship, are "charitable," and the section I have cited plainly shews that Roman Catholics in Scotland are, so far as concerns property held for "charitable purposes," entitled to have as wide a construction put upon these words as Protestant Dissenters in England. The word is again used in the same way, and with the same meaning, in the enactments of the Imperial Statute, 9 & 10 Vict. c. 59, which was passed in order to place Her Majesty's subjects in the United Kingdom, professing the Jewish religion, on the same footing as these English Dissenters with respect to their "schools, places for religious worship, education, and charitable purposes."

The only other Act I shall refer to is a taxing statute, viz.: the Succession Duty Act of 1853 (16 & 17 Vict. c. 51). Section 16 imposes a duty of 10 per cent. upon real estate which shall become subject to a trust "for any *charitable or public purposes*, under any past or future disposition, which, if made in favour of an individual, would confer on him a succession." The clause then provides means for enabling the trustees of estates settled

to these purposes to procure funds for payment of the tax, in these terms: "And it shall be lawful for the trustee *of any such property* to raise the amount of any duty due in respect thereof, with all reasonable expenses, *upon the security of the charity property*, at interest, with power for him to give effectual discharges for the money so raised." This is an Imperial Act, and it specifically describes heritable estate in Scotland, held in trust for any public purpose unconnected with the poor, as "charity property."

The authorities to which I have referred appear to me to justify the conclusion that, whilst in litigated cases there has been no occasion to determine, and, therefore, no determination of the precise import of the word "charitable" in Scotch law; it has been employed, in the legislative language of the Scottish Parliament, and of the British Parliament when legislating for Scotland, in substantially the same sense in which it has been interpreted by English courts. It must, therefore, in my opinion, receive that interpretation in the Income Tax Act of 1842.

Whilst I have found these reasons to be sufficient for the disposal of this appeal, I desire to express my entire concurrence in the opinions to be delivered by my noble and learned friends, Lords Herschell and Macnaghten, which I have had ample opportunity of considering in print. I move that the Order appealed from be affirmed, and the Appeal dismissed with costs.

LORD BRAMWELL:—

My Lords, I agree that the respondent is entitled to judgment as to one half of the tax paid. As to the other half I entirely agree in the opinion of the Lord Chancellor, his reasons and conclusions, and the way he has applied his authorities. But I have some observations of my own to make.

The question that remains is whether lands with a trust to apply income for the purpose of "maintaining, supporting, and advancing the missionary establishment among heathen nations of the Protestant Episcopal Church known by the name of Unitas Fratrum or United Brethren," are "for charitable purposes" within 5 & 6 Vict. c. 35, s. 61. It is said that they are on two grounds; first, that the natural meaning of the words

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"charitable purposes" includes such a trust; secondly, that whether it does or not, "charitable purposes" have a technical meaning, and include everything that would have been administered in Chancery under 43 Eliz. c. 4, or which had been administered, as I understand it, by the Court of Chancery, upon the same principle, before the passing of that Act.

It is somewhat remarkable that some of the opinions in favour of the respondent are so on the first ground, and think the other wrong; whilst others are in their favour on the second ground and not on the first. Some are against them on both, my Lord Chancellor, Lord Coleridge, the Scotch Judges in *Baird's Case* (1), and I must add myself.

I hold that the conversion of heathens and heathen nations to Christianity or any other religion is not a charitable purpose. That it is benevolent, I admit. The provider of funds for such a purpose doubtless thinks that the conversion will make the converts better and happier during this life, with a better hope hereafter. I dare say this donor did so. So did those who provided the faggots and racks which were used as instruments of conversion in times gone by. I am far from suggesting that the donor would have given funds for such a purpose as torture; but if the mere good intent makes the purpose charitable, then I say the intent is the same in the one case as in the other. And I believe in all cases of propagandism there is mixed up a wish for the prevalence of those opinions we entertain, because they are ours.

But what is a *charitable* purpose? Whatever definition is given, if it is right as far as it goes, in my opinion this trust is not within it. I will attempt one. I think a charitable purpose is where assistance is given to the bringing up, feeding, clothing, lodging, and education of those who from poverty, or comparative poverty, stand in need of such assistance: see per Lord Coleridge (2). That a temporal benefit is meant, being money, or having a money value. This definition is probably insufficient. It very likely would not include some charitable purposes, though I cannot think what, and include some not charitable, though also I cannot think what; but I think it

(1) 15 Sess. Cas. 4th Series, 682. (2) 22 Q. B. D. 301.

substantially correct, and that no well-founded amendment of it would include the purposes to which this fund is dedicated. Todd's Johnson gives the meaning "kind in giving alms, liberal to the poor, kind in judging of others, disposed to tenderness, benevolent." But of course the word must be construed in the sentence where it is found, and the question is whether this trust is for charitable purposes within the Income Tax Act. The first meaning alone is applicable. Indeed, the word "benevolent" seems to me to have caused the difficulty. The purposes of this trust are doubtless "benevolent;" good was wished to others; but certainly every benevolent purpose is not charitable. I think there is some fund for providing oysters at one of the Inns of Court for the Benchers; this, however benevolent, would hardly be called charitable; so of a trust to provide a band of music on the village green. I cannot quite accept Lord Esher's definition; he says, "allowances are to be made when the rents and profits are given in trust to be expended in assisting people to something considered by the donor to be for their benefit." But that would include such cases as I have put, which I do not think his Lordship would consider charitable purposes. He proceeds, and I agree with him, "and which assistance the donor intends shall be given to people who in his opinion cannot without such assistance by reason of poverty obtain that benefit." Be it so, but that excludes this trust; there is no poverty contemplated in those who are to be benefitted, nor any notion that an addition to their means would procure them that benefit. What of a trust for the conversion of the Jews? Is that a charitable purpose? If so, what of a trust for the reconversion? It seems to me, that the extended meaning of "charitable purposes" would include every case of amusement and pleasure that could be thought of. I cannot think this was the intention of the Legislature. It is suggested that a fund for the saving of shipwrecked sailors would be for a charitable purpose. That is not this case. But would it? If so, would jumping into the sea to save a sailor be an act of charity? We say, "He takes a charitable view of its conduct," "kind in judging of others," using the word as equivalent to "benevolent." It is confounding the two words that seems to me to lead to the difficulty. What

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was the intention, and why the exemption is made in the Act, is of course very much guess-work. But something like a reasonable ground may be suggested in this: that when the gift is of such a character as I have suggested in my definition, to tax the charity is to tax the poor, or take from the poor who would otherwise get the amount of the tax.

It is to be remembered, as has been mentioned, that to exempt any subject of taxation from a tax is to add to the burthen on taxpayers generally, and a very large exemption must be made if the respondent is right for the benefit of so-called charities, many of which are simply mischievous. On these considerations I hold that the natural meaning of the words "charitable purposes" excludes one-half of the income of these funds.

I now come to the other ground on which the exemption is claimed. It is said that whether or no the natural meaning of "charitable purposes" includes the purposes of this trust, those words have an artificial meaning, or a meaning given by statute or use, and must be interpreted accordingly. The argument, as I understand it, is this: The 43 Eliz. c. 4, is entitled, "An Act to redress the Misemployment of Lands, Goods, and Stocks of Money heretofore given to Charitable Uses." It then enumerates a variety of uses or purposes, some of which are not charitable according to any ordinary definition of the word; therefore, "charitable uses" in the title means charitable uses, and more than those, benevolent uses, and uses for the public or general good, or that of portions of the public, or of individuals. Then it is said that this interpretation of "charitable uses" has been followed by other statutes, and by decisions from the passing of the statute hitherto, and so "charitable purposes," when those words occur in any statute, must be understood as including whatever would be held to be within the statute of Elizabeth, and that the purposes here would be so held.

I cannot follow this reasoning. It would fall to the ground if the title of the statute had been "charitable *and other benevolent uses*," or some similar expression, as it ought to have been, in strictness. Because, as I have said, I think it is certain that some of the purposes mentioned in the preamble are in no sense charitable. I cannot agree with Fry L.J. It is a strange thing

that the title should make things "charitable" which are not so, rather than that the preamble should be understood as going beyond the title, which compendiously and conveniently spoke of charitable uses only. I believe that all that has been done is what I have said, viz., that following decisions and statutes have spoken of cases as "charitable uses," meaning cases within or dealt with as though within the statute of Elizabeth. An example of this will be seen in the Charitable Trusts Act 1853, the interpretation clause of which (sect. 66) says, "charity shall mean every endowed foundation and institution taking or to take effect in England or Wales, and coming within the meaning, purview, or interpretation of the statute of 43 Eliz. c. 4, or as to which, or the administration of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction."

I have said that some cases within the 43 Eliz. could not, according to any reasonable definition of the words, be said to be "charitable purposes." I take, for example, "schools of learning" not limited to the poor, "repair of sea-banks," "relief, &c., for houses of correction," which is in aid of rates not paid by the poor. So, also, a bequest for keeping chimes in repair has been held to be within the statute (*Turner* v. *Ogden* (1)), perhaps because causing a lessening of church rates, if, indeed, they could have been applied to such a purpose, which I do not know. So, also, a bequest upon trust to pay, divide or dispose thereof for the benefit or advancement of societies, subscriptions or purposes having regard to the glory of God in the spiritual welfare of his creatures: *Townsend* v. *Carus* (2). So, also, a school for the sons of gentlemen: *Attorney-General* v. *Lord Lonsdale* (3). Let it not be supposed that I find any fault with Courts of Equity for calling every trust within the statute of Elizabeth a charity. It was not strictly accurate, but was concise, and saved a circumlocution.

There is a very difficult and embarrassing matter to be considered. Every one admits, I believe, that the construction of the Income Tax Act ought to be the same in Scotland as in England; but the Scotch Courts say that the natural meaning of the words

(1) 1 Cox, 316. (2) 3 Hare 257.
(3) 1 Sim. 105, 109.

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"charitable purposes" does not include such purposes as these, and that those words have not acquired a technical meaning to that effect. What answer is it to say that by English law it is so called for certain purposes? I do not agree it is so called; but suppose it were, what answer would it be? Suppose the case arose in England, and we were asked to interpret a statute, not according to its ordinary meaning, but according to some mode of expression used in Scotland? On the other hand, your Lordships have the advice of my noble and learned friend, Lord Watson, who says the words ought to be interpreted in favour of the respondent in Scotland. I cannot think so. Fry L.J. says the words are technical, and should be interpreted in Scotland as in England. I cannot see why. Lord Esher and Lopes L.J. do not agree. I do not know that they have a right to express an opinion on Scotch law, though we must. It seems to me that the argument shews that that has happened in Scotland which has happened in England, viz., that everything charitable, godly, pious came to be compendiously called "charitable." I think this appears from the instances cited by my noble and learned friend Lord Watson. Take the case of the *University of Aberdeen* v. *Irvine* (1), where "a trust for college bursars who did not necessarily belong to the class of indigent persons" was dealt with as a charity. It was benevolent, doubtless, but not charitable.

I think the judgment on this should be reversed. As the majority of your Lordships think otherwise the State will be a subscriber of £17 a year to supporting, maintaining, and subsidising "the missionary establishment among heathen nations of the Protestant Episcopal Church known by the name of the Unitas Fratrum, or United Brethren." Whether this was meant by the authors of the Income Tax Act, if it was, why, and whether it will be continued, are questions not before us.

LORD HERSCHELL:—

My Lords, two points were made on behalf of the appellants, the Commissioners of Income Tax, at your Lordships' bar. It was said, first, that the respondent was not entitled to the allow-

(1) L. R. 1 H. L., Sc. 289.

ance which he claimed under sect. 61 of the Income Tax Act; and it was next contended that even if entitled to that allowance mandamus was not the proper remedy for a refusal to grant it.

At the close of the arguments on behalf of the appellants, all your Lordships were of opinion that the latter point had not been made good. I confess it appears to me very clearly to be a case for a mandamus if the commissioners have wrongly refused to grant the allowance and to give the certificate provided for by the statute. The duty of granting the allowance in certain specified cases is imposed upon the commissioners by the statute in unequivocal terms, and no reason was assigned why the ordinary remedy by mandamus was inapplicable in the case of a breach of this statutory duty, except the suggestion that the respondent should have proceeded by petition of right. The case of *Re Nathan* (1) was relied on in support of this position. But that was a very different case. It was sought by that proceeding to compel the Commissioners of Inland Revenue to make payment of a certain sum of money to the applicant for the mandamus; and it was held that for such a purpose recourse must be had to a petition of right. Here the applicant seeks that the appellants should be compelled to grant an allowance and certificate, which it is necessary for him to obtain before he is in a position to require payment of the sum which it is no doubt his ultimate object to recover. Until he obtains this allowance and certificate, he is not in a position to maintain a petition of right.

The main, and indeed the only question, arising on this appeal, apart from the objection to the form of procedure with which I have already dealt, is to my mind one of very considerable difficulty. The Income Tax Act provides that allowances shall be granted by the commissioners "on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes." The question in controversy is, what is the scope of the term "charitable purposes" in this enactment? The respondent is the treasurer of the Church of the United Brethren,

(1) 12 Q. B. D. 461.

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commonly called Moravians. He claimed an allowance in respect of certain lands vested in trustees for objects connected with that community. Two-fourths of the rent of these lands are by the trust deed directed to be applied to objects of an eleemosynary and educational character, which were admitted by the appellants at your Lordships' bar to be "charitable purposes" within the statute. It is only necessary, therefore, to consider the application of the remaining moiety. The trust is in these terms: "As to two equal fourth parts thereof for the general purposes of maintaining, supporting, and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, known by the name of Unitas Fratrum, or United Brethren." The question at issue may be shortly stated thus: Are lands which are vested in trustees for the purpose of maintaining and advancing missions among the heathen, vested in them for "charitable purposes," within the meaning of the statute? This is all that your Lordships have to determine, but it is impossible to determine it without arriving at a conclusion as to the construction to be put upon the words "charitable purposes" in the statute with which we are concerned. The question is consequently one of far reaching importance.

It is said by the respondent that the expression "trust for charitable purposes" is well known to the law of this country, and has acquired, by a current of decisions in the Court of Chancery, a clearly defined meaning which has been recognised and adopted by the Legislature in numerous enactments, and that the same meaning ought to be attributed to it in the Income Tax Act. There can be no doubt that the words in question have, in the law of England, and of Ireland also, the well-defined meaning alleged. And if the Income Tax Acts applied to England and Ireland alone, I do not think there could be any ground for hesitation in adopting the construction contended for, and interpreting the words in the sense in which they have been again and again employed by the Legislature.

But it is said on behalf of the appellants, that the Income Tax Acts extend to Scotland also, and that the suggested construction is on that account inadmissible, inasmuch as the words "charitable purposes" have, in Scotland, a much more limited

meaning. The exemption, it is said, must have been intended to be co-extensive in the three countries, and therefore a meaning of the words must be sought for which obtains in all. If the words had a technical meaning in Scotland different from that prevailing in this country, I think the argument would be irresistible, and I should feel a difficulty in resisting it, if they had a well-defined and recognised meaning, even though it were a popular and not a technical one.

The construction to be put upon the enactment under consideration came before the Court of Session in the case of *Baird's Trustees* v. *Lord Advocate* (1). The learned judges were of opinion that the words "charitable purposes" must be read in their popular signification, and could not have the comprehensive meaning attached to them in the English law. The Lord President said, "Charity is relief of poverty, and a charitable act or a charitable purpose consists in relieving poverty; whatever goes beyond that is not within the meaning of the word 'charity,' as it occurs in this statute." Lord Shand took the same view, but apparently limited the application of the term to the relief of physical necessities resulting from poverty. He said, "I think the term 'charitable purposes only,' used in a modern statute, in the absence of any other terms indicating that a wider meaning is intended, is to be taken in its ordinary sense, as referring to funds given for the relief or pecuniary assistance of persons in poverty. I think it relates to funds dedicated to the relief of physical necessity or want, to funds given as alms, or as a provision for the relief of persons from physical privations or suffering arising from poverty."

I am unable to agree with the view that the sense in which "charities" and "charitable purpose" are popularly used is so restricted as this. I certainly cannot think that they are limited to the relief of wants occasioned by lack of pecuniary means. Many examples may, I think, be given of endowments for the relief of human necessities, which would be as generally termed charities as hospitals or almshouses, where, nevertheless, the necessities to be relieved do not result from poverty in its limited sense of the lack of money. Take, for example, an

(1) 15 Sess. Cas. 4th Series, 682.

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institution for saving the lives of shipwrecked mariners. Its object is to render assistance to those in dire want of it, to meet a form of human need which appeals to the benevolent feelings of mankind, but not one which has its origin in the lack of money. Nevertheless, I do not believe that any one would hesitate to call it a charity, or to say that money expended in rescuing drowning men was applied to a charitable purpose. Or again, what of a society founded for the protection of children of tender years from cruelty? Would not this be commonly described as a charitable purpose? And yet it is not pecuniary destitution that creates the necessity which such a society is designed to relieve. It is the helplessness of those who are the objects of its care which evokes the assistance of the benevolent. I think, then, that the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief.

Nor am I prepared to say that the relief of what is often termed spiritual destitution or need is excluded from this conception of charity. On the contrary, no insignificant portion of the community consider what are termed spiritual necessities as not less imperatively calling for relief, and regard the relief of them not less as a charitable purpose than the ministering to physical needs; and I do not believe that the application of the word "charity" to the former of these purposes is confined to those who entertain the view which I have just indicated. It is, I think, constantly and generally used in the same sense quite irrespective of any belief or disbelief in the advantage or expediency of the expenditure of money on these objects. It is a mistake to suppose that men limit their use of the word "charity" to those forms of benevolent assistance which they deem to be wise, expedient, and for the public good. There is no common consent in this country as to the kind of assistance which it is to the public advantage that men should render to their fellows, or as to the relative importance of the different forms which this assistance takes. There are some who hold that even hospitals and almshouses, which are specially mentioned by the Legislature, discourage thrift, and do upon the

whole harm, rather than good. This may be an extreme view entertained by few, but there are many who are strongly convinced that doles, and other forms of beneficence, which must undoubtedly be included, however narrow the definition given to the term "charitable purpose," are contrary to the public interest; that they tend to pauperise and thus to perpetuate the evil they are intended to cure, and ought to be discouraged rather than stimulated. It is common enough to hear it said of a particular form of almsgiving that it is no real charity, or even that it is a mischievous form of charity. I think, then, that a purpose may be regarded by common understanding as a charitable purpose, and so described in popular phraseology even though opinions differ widely as to its expediency or utility.

The truth is, that the word "charity" has no sharply-defined popular meaning. It is used at different times in varying senses, broader or narrower. Sometimes, no doubt, it is employed in the limited sense adopted by the Court of Session, but at others it serves to embrace all expenditure which motives of benevolence induce men to make for the benefit of their fellows.

If, then, one were driven to interpret the words under construction according to their popular signification, I think the proper course would be to prefer the broadest sense in which they are employed, and that such an interpretation would embrace the case with which your Lordships have to deal. But an examination of the statutes referred to by my noble and learned friend Lord Watson, has satisfied me that in the language of Scotch legislation they have been employed in a sense practically coextensive with that attributed to them by the law of England, and there are, so far as I know, no decisions of the Courts of Scotland, prior to the case of *Baird's Trustees* (1), which have put a narrower interpretation on them.

Under these circumstances, I think the proper course is to interpret the words in the Income Tax Act in the sense in which they have been used alike in the law of both countries.

I ought, perhaps, to notice the argument presented to your Lordships, that some more limited meaning of these words is

(1) 15 Sess. Cas. 4th Series, 682.

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suggested by the provisions in connection with which they are found, and the specific exceptions contained in the statute. I think that an argument derived from the specific mention of certain subjects in the exemptions found in a taxing Act is of little weight. Such specific exemptions are often introduced ex majori cautelâ to quiet the fears of those whose interests are engaged or sympathies aroused in favour of some particular institution, and who are apprehensive that it may not be held to fall within a general exemption.

I concur in thinking that the judgment appealed from ought to be affirmed.

LORD MACNAGHTEN :—

My Lords, the circumstances which have given rise to the present question are peculiar. The question itself is important, but it does not, I think, involve serious difficulty.

Income Tax Acts have been in force in this country without any intermission since 1842, and, with one long interval, ever since the close of the last century. Every Act has contained an exemption in favour of property dedicated to charitable purposes. What are charitable purposes within the meaning of these Acts the legislature has nowhere defined; but from the very first it was assumed, as a matter not open to controversy, that the exemption applied to all trusts known to the law of England as charitable uses or trusts for charitable purposes. On that principle, without inequality and apparently without difficulty, the law was administered in England and Scotland, and afterwards, when the tax extended to Ireland, throughout the whole of the United Kingdom. At length, about three or four years ago, the Board of Inland Revenue discovered that the meaning of the legislature was not to be ascertained from the legal definition of the expressions actually found in the statute, but to be gathered from the popular use of the word "charity." Proceeding on this view they refused remissions in cases in which the remission had been claimed and allowed as a matter of right for more than forty years continuously.

The action of the Board was confirmed in Scotland by the Court of Session, in the case of *Baird's Trustees* v. *Lord Advo-*

cate (1). There it was held that, "in ordinary familiar and popular use," charity had only one sense, the relief of poverty, and that the exemption related to funds given as alms, or as a provision for the relief of persons from physical privations or sufferings arising from poverty, and that it went no further. The opinion of the Court was based on a proposition which I will state in the words of the Lord President. "It appears to me," his Lordship observed, "that in the construction of taxing Acts the Court must always take it for granted, where these Acts apply to the whole United Kingdom, that the words used by the legislature are used in their popular and ordinary signification, and are not technical legal terms belonging to one system of jurisprudence, which may exist in one part of the United Kingdom and not in another. The occurrence of such technical terms as these in a taxing Act would have the most disturbing and confusing effect, and it would be very difficult indeed to administer such a statute as applicable to the whole United Kingdom. And, accordingly, we always find in these taxing Acts that the words used are words of ordinary meaning, which are understood by everybody, whether in England, Scotland, or Ireland, in the same sense."

In deciding the present case the Divisional Court (Lord Coleridge C.J., Grantham J. dissenting) followed and approved the reasoning of the Court of Session. The decision was reversed on appeal, but the majority of the Court of Appeal agreed with the Lord Chief Justice so far as to hold that the legal meaning of the words in question must be rejected in favour of their popular signification. They thought, however, that the Lord Chief Justice had taken too narrow a view. Lord Esher M.R., with whom Lopes L.J. concurred, by way of giving an explanation of practical use, paraphrased the enactment as follows: "Allowances are to be made in respect of the duties on the rents and profits of lands, tenements, hereditaments, or heritages vested in trustees when the rents and profits are given in trust to be expended in assisting people to something considered by the donor to be for their benefit, and which assistance the donor intends shall be given to people who, in his opinion, cannot

(1) 15 Sess. Cas. 4th Series, 682.

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without such assistance, by reason of poverty, obtain that benefit, and where the intention of the donor is to assist such poverty as the substantial cause of his gift." Fry L.J. differing from the Court of Session, considered that the expression "charitable purposes" had acquired a technical meaning in Scotland as it undoubtedly had in England and Ireland, and that consequently he was bound to adopt that meaning.

In the course of the argument at your Lordships' Bar the learned counsel for the Crown admitted that the construction adopted by the Court of Session and the Lord Chief Justice was too narrow, but they insisted that the words must be construed in some popular sense, and without attempting any definition they contended that the expression "charitable purposes," in its ordinary acceptation among persons of education, would not include the purpose of converting the heathen.

In this state of perplexity the question remains for your Lordships to decide.

It will be convenient, I think, in the first place to deal with the more important considerations which seem to have weighed with the Courts in approaching the subject. Foremost of all is the very broad proposition on which the decision of the Court of Session rests, and which has been adopted rather hastily, I think, by the Lord Chief Justice and the majority of the Court of Appeal. Is it true, as a matter of fact, that we always find in these taxing Acts that the words used are words of ordinary meaning, understood by everybody in the three kingdoms in the same sense, and not technical legal terms in use in one part of the United Kingdom? I could wish it were so. But we are not living in Utopia, where a perfect or ideal lawgiver may be had very readily. The Income Tax Acts themselves form an instructive commentary on the proposition of the Lord President. In the earliest Income Tax Act, the Act of 1799, except when it deals with commissioners for districts in Scotland, the language is the language of an English lawyer. So little attention was paid to the legal phraseology of Scotland, that the word "heritages" does not, I think, occur in the Act. The term used to denote real property is the expression "lands, tenements, and hereditaments." In the Acts of 1803 and 1806

the word "heritages" is introduced, but it will not be found inserted in all places where it seems to be required. Even in the Act of 1806 you will find the words "hereditaments" and "messuages"—words I should suppose not of ordinary meaning in Scotland, nor familiar in their English sense to Scotch lawyers—used as applicable to all parts of Great Britain. Another example not without some bearing on the present question is presented by the Succession Duty Act 1853. That is a taxing Act. It extends to the three kingdoms. No statute was ever drawn with more care. Studiously and with great skill it avoids technical expressions wherever they would be likely to create confusion. Yet there we find the very word "charity," which has given rise to all this argument, used in its technical sense according to English law, and applied to property belonging to public trusts in Scotland as well as to property dedicated to charitable purposes in England. In sect. 16 the Act provides for the case of "a succession to property subject to a trust for any charitable or public purposes," and it goes on to give the trustee of any such property, who is made responsible for the duty and a debtor to the Crown in the event of non-payment, power to raise the duty. How is it to be raised? All the Act says is, "Upon the security of the charity property."

Again, I ask, is the Lord President correct in saying that in construing a taxing Act extending to the whole of the United Kingdom, the Court must always take it for granted "that the words used by the legislature are used in their popular signification"? I can find no authority for such a proposition. There is, indeed, a passage in the judgment of Lord Campbell in *Lord Saltoun* v. *Lord Advocate* (1) which at first sight looks like an authority, and is so treated in the rubric. In reality it has no bearing upon the point. The case was this: Lord Saltoun, under an entail created by his grandmother, succeeded to a settled property on the death of his uncle without heirs male of his body. What was the rate of duty? Was it 3 per cent., as on a succession from an uncle, or 1 per cent., as on a succession from a lineal ancestor? This House, differing from the Court of Session, took the latter view, and Lord Campbell began his

(1) 3 Macq. 659.

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judgment with these observations: "In construing the statute on which the case depends we must bear in mind that it applies to the whole of the United Kingdom, and that the intention of the legislature must be understood to be that the like interests in property taken by succession should be subjected to the like duties, wheresoever the property may be situated. The technicalities of the laws of England and of Scotland, where they differ, must be disregarded, and the language of the legislature must be taken in its popular sense." The technicalities to be disregarded were not technical expressions in the Act, but, as Lord Wensleydale I think very clearly points out, the technicalities of the law of real property outside the Act altogether. In the Act itself, so far as it came under consideration in that case, there were no technical expressions belonging to the law of either country. But outside the Act there was the technical rule of Scotch law, by which each succeeding substitute takes the whole fee, and must be served heir to the preceding owner.

Since these remarks have been in print, I have had the advantage of reading the adverse criticism passed upon them by my noble and learned friend on the woolsack. My noble friend observes that in *Lord Saltoun's Case* (1) "the word which was in debate was 'predecessor'"; that "the turning point of the case" was the question, "whether that word was to receive its meaning according to technical application in Scotch law, or its more popular meaning"; and, moreover, that "it was with reference to that word 'predecessor' that Lord Campbell's observations were made." My noble friend's opinion, if I am not mistaken, is based on these premises. Are they quite sound? Lord Campbell possibly may have supposed that the term "predecessor" was a technical expression with Scotch lawyers. But, even so, it must not, I think, be assumed that he thought its meaning open to debate in *Lord Saltoun's Case* (1). The very Act before him defined the term "predecessor." The definition seems somewhat remote from the popular meaning of the word, and not less remote from any technical application of it that can be imagined. When you find a special meaning assigned to a particular word in an Act of Parliament you must abide by that meaning in constru-

(1) 3 Macq. 659.

ing the Act—you cannot add to it or take away from it—nor can you substitute anything else for it. And, therefore, with the utmost respect, I venture to doubt whether it would have been permissible in *Lord Saltoun's Case* (1) to discuss the comparative merits of other meanings which the Act had not adopted. And certainly I have some difficulty in understanding how such a discussion, if permitted, could have presented or involved the turning point of the case. In point of fact the question in *Lord Saltoun's Case* (1) was not, Which of two meanings of a certain word was to be preferred, but Which of two persons was to be taken as fulfilling the conditions of the statutory definition of that word.

It seems to me that statutes which apply to Scotland as well as to England, and which touch upon matters commonly dealt with in legal language may be divided into three classes. Sometimes, but very rarely, legal terms are carefully avoided, as in the Succession Duty Act. Sometimes in very recent statutes, as in the Bills of Exchange Act and the Partnership Act, every legal term according to English law is immediately followed by its equivalent in Scotch legal phraseology; and where no exact equivalent is to be found, a neutral and non-legal expression is adopted. But in some cases certainly, and especially in the legislation of former days, the statute proclaims its origin, and speaks the language of an English lawyer, with some Scotch legal phrases thrown in rather casually. The Income Tax Acts, I think, fall within this class, though, no doubt, the Act of 1842 is less conspicuously English than its predecessors. How are you to approach the construction of such statutes? We are not, I think, quite without a guide. It seems to me that there is much good sense in what Lord Hardwicke says in his well-known letter to an eminent Scotch judge (2). Incidentally he happens to deal with the very point. He observes that where there are two countries with different systems of jurisprudence under one legislature, the expressions in statutes applying to both are almost always taken from the language or style of one, and do not

(1) 3 Macq. 659.

(2) See Lord Kames' Elucidations, p. 385 (ed. 1800), referred to in the report of *Lord Saltoun's Case*, 3 Macq. at p. 675, note (a).

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harmonize equally with the genius or terms of both systems of law. That was, perhaps, rather a delicate way of stating the case, but one must remember to whom Lord Hardwicke was writing, and his meaning is perfectly clear. Then he explains how these statutes ought to be expounded. You must, he says, as in other sciences, reason by analogy—that is, as I understand it, you must take the meaning of legal expressions from the law of the country to which they properly belong, and in any case arising in the sister country you must apply the statute in an analogous or corresponding sense, so as to make the operation and effect of the statute the same in both countries. Thus you get what Lord Hardwicke calls "a consistent, sensible construction." A simpler plan is now recommended. Though the words have a definite legal meaning in England, you must not, it is now said, look at that meaning unless it be in vogue north of the Tweed. You must put out the light you have, unless it penetrates directly to the furthest part of the room. That was not Lord Hardwicke's view. He seems to have thought reflected light better than none.

In construing Acts of Parliament, it is a general rule, not without authority in this House (*Stephenson* v. *Higginson* (1)) that words must be taken in their legal sense unless a contrary intention appears. Is a contrary intention shewn merely by the circumstance that the legal meaning of the words used belongs more properly, or even exclusively, to the jurisprudence of one part of Great Britain? Agreeing with Lord Hardwicke rather than with the Court of Session, I am disposed to answer that question in the negative.

That according to the law of England a technical meaning is attached to the word "charity," and to the word "charitable" in such expressions as "charitable uses," "charitable trusts," or "charitable purposes," cannot, I think, be denied. The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable. Charitable uses or trusts form a distinct head of equity. Their distinctive position is made the more conspicuous

(1) 3 H. L. C. at p. 686.

by the circumstance that owing to their nature they are not obnoxious to the rule against perpetuities, while a gift in perpetuity not being a charity is void. Whatever may have been the foundation of the jurisdiction of the Court over this class of trusts, and whatever may have been the origin of the title by which these trusts are still known, no one I think who takes the trouble to investigate the question can doubt that the title was recognised and the jurisdiction established before the Act of 43 Eliz. and quite independently of that Act. The object of that statute was merely to provide new machinery for the reformation of abuses in regard to charities. But by a singular construction it was held to authorize certain gifts to charity which otherwise would have been void. And it contained in the preamble a list of charities so varied and comprehensive that it became the practice of the Court to refer to it as a sort of index or chart. At the same time it has never been forgotten that the "objects there enumerated," as Lord Chancellor Cranworth observes (1), "are not to be taken as the only objects of charity but are given as instances." Courts of Law, of course, had nothing to do with the administration of trusts. Originally, therefore, they were not concerned with charities at all. But after the passing of the Act 9 Geo. 2, commonly known as the Statute of Mortmain, which avoided in certain cases gifts to "uses called charitable uses," alienations and dispositions to charitable uses sometimes came under the cognizance of Courts of Law, and those Courts, as they were bound to do, construed the words "charitable uses" in the sense recognised in the Court of Chancery, and in the Statute of Elizabeth, as their proper meaning. I have dwelt for a moment on this point, because it seems to me that there is a disposition to treat the technical meaning of the term "charity" rather as the idiom of a particular Court than as the language of the law of England. And yet of all words in the English language bearing a popular as well as a legal signification I am not sure that there is one which more unmistakeably has a technical meaning in the strictest sense of the term, that is a meaning clear and distinct, peculiar to the law as

(1) 1 D. & J. 79.

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understood and administered in this country, and not depending upon or coterminous with the popular or vulgar use of the word.

In Ireland, though neither the Statute of Elizabeth nor the so-called Statute of Mortmain extended to that country, the legal and technical meaning of the term "charity" is precisely the same as it is in England.

As regards the law of Scotland, the case is somewhat different. I think that Fry L.J., with whose very able judgment in other respects I concur, has gone rather too far in saying that the word "charity" has the same technical meaning in Scotland which it has in England. On the other hand, it seems to me that, in the case of *Baird's Trustees* (1), the Court of Session has erred more seriously in the opposite direction.

To borrow the words of Lord Chelmsford (*Magistrates of Dundee* v. *Morris* (2)) "I cannot discover that there is any great dissimilarity between the law of Scotland and the law of England with respect to charities."

And the result of such researches as I have been able to make is, that in the Scotch Act to which Mr. Crackenthorpe referred, the Act of 1633—in some statutes extending to Scotland, as in 2 & 3 Will. 4, c. 115, a Roman Catholic Relief Act, and the Succession Duty Act, 1853, to which I have already referred—in some opinions, delivered by Scotch judges in Scotland, as in the case of *Ferguson* v. *Marjoribanks* (3), and not unfrequently in this House, sitting as a Court of Scotch Appeal, as in the *University of Aberdeen* v. *Irvine* (4); and *Andrews* v. *McGuffog* (5), the words "charity" and "charitable" are used sometimes in the sense which they bear in English law, sometimes in a sense hardly distinguishable from it. If this conclusion is right, although the expression "charitable purposes" may not have acquired a technical meaning, properly so called, in the law of Scotland, I cannot see that the use of the expression in a general Act as a legal term without the addition of its equivalent according to Scotch law (if any such equivalent could be found)

(1) 15 Sess. Cas. 4th Series, 682.
(2) 3 Macq. 154.
(3) 15 Sess. Cas. 2nd Series, 637.
(4) Law Rep. 1 H. L., Sc. 289.
(5) 11 App. Cas. 313.

would of itself, and apart from other circumstances, either create surprise or lead to any practical difficulty.

No doubt the popular meaning of the words "charity" and "charitable" does not coincide with their legal meaning; and no doubt it is easy enough to collect from the books a few decisions which seem to push the doctrine of the Court to the extreme, and to present a contrast between the two meanings in an aspect almost ludicrous. But still it is difficult to fix the point of divergence, and no one as yet has succeeded in defining the popular meaning of the word "charity." The learned counsel for the Crown did not attempt the task. Even the paraphrase of the Master of the Rolls is not quite satisfactory. It would extend to every gift which the donor, with or without reason, might happen to think beneficial for the recipient; and to which he might be moved by the consideration that it was beyond the means of the object of his bounty to procure it for himself. That seems to me much too wide. If I may say so without offence, under conceivable circumstances, it might cover a trip to the Continent, or a box at the Opera. But how does it save Moravian missions? The Moravians are peculiarly zealous in missionary work. It is one of their distinguishing tenets. I think they would be surprised to learn that the substantial cause of their missionary zeal was an intention to assist the poverty of heathen tribes. How far then, it may be asked, does the popular meaning of the word "charity" correspond with its legal meaning? "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly. It seems to me that a person of education, at any rate, if he were speaking as the Act is speaking with reference to endowed charities, would include in the category educational and religious charities, as well as charities for the relief of the poor. Roughly speaking, I think he would exclude the fourth division. Even

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there it is difficult to draw the line. A layman would probably be amused if he were told that a gift to the Chancellor of the Exchequer for the benefit of the nation was a charity. Many people, I think, would consider a gift for the support of a life-boat a charitable gift, though its object is not the advancement of religion, or the advancement of education, or the relief of the poor. And even a layman might take the same favourable view of a gratuitous supply of pure water for the benefit of a crowded neighbourhood. But after all, this is rather an academical discussion. If a gentleman of education, without legal training, were asked what is the meaning of "a trust for charitable purposes," I think he would most probably reply, "That sounds like a legal phrase. You had better ask a lawyer."

Having attempted to clear the ground so far, I come to the words of the enactment on which the question before the House depends. They are to be found in the Income Tax Act of 1842. By sect. 61 of that Act it is provided that, under Sched. A, certain allowances are to be made for the duties charged on colleges or halls in the universities, and on any hospital, public school, or alms-house in respect of their public buildings, offices, and premises. The allowances are to be granted by the Commissioners for General Purposes in their respective districts.

Then allowances are to be made "on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or alms-house, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes." These allowances are in the hands of quite a different body. They are to be granted "on proof before the Commissioners for Special Purposes of the due application of the said rents and profits to charitable purposes only, and in so far as the same shall be applied to charitable purposes only." They are "to be claimed and proved by any steward, agent, or factor acting for such school, hospital, or alms-house, or other trust for charitable purposes, or by any trustee of the same by affidavit . . . stating the amount of the duties chargeable, and the application thereof," and are to be carried into effect by the Special Commissioners without altering the assessments which are to be levied notwithstanding such allowances.

By the 88th section it is provided, with respect to Sched. C., that exemption shall be given to "the stock or dividends of any corporation, fraternity, or society of persons, or of any trust established for charitable purposes only; or which according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, shall be applicable by the said corporation, fraternity, or society, or by any trustee to charitable purposes only, and in so far as the same shall be applied to charitable purposes only; or the stock or dividends in the names of any trustees applicable solely to the repairs of any cathedral, college, church, or chapel, or any building used solely for the purpose of divine worship, and in so far as the same shall be applied to such purposes, provided the application thereof to such purposes shall be duly proved before the said Commissioners for Special Purposes by any agent or factor on the behalf of any such corporation, fraternity, or society, or by any of the members or trustees."

Section 98 contains directions as to the manner in which these claims of exemption are to be made and carried into effect.

Section 105 provides by reference to the provisions of Sched. C, for similar exemptions under Sched. D, in the case of "any corporation, fraternity, or society of persons and any trustee for charitable purposes only."

In the case of the British Museum, sect. 149 provides for the like allowances under Sched. A, "as are granted to colleges and other properties mentioned in No. 6 of that Schedule," and the like exemptions in respect of any dividends of stock," as are granted to charitable institutions" in the Act.

Section 188 enacts that every provision applied to the duties in any particular schedule, which is also applicable to the duties in any other schedule, and not repugnant to its provisions shall be applied as fully and effectually as if the application thereof had been expressly directed.

I do not think it necessary to refer to any other provisions in the statute.

What is the meaning of the expression "charitable purposes," as used in the Act of 1842? In order to determine that question, it is necessary, I think, to consider what the Act is speaking

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about, and whom it is speaking to. It does not help one much to take the word "charity" nakedly, and in the abstract, and then to turn to dictionaries for its meaning. It is said that the most common signification of "charity" is conveyed by the word "alms." So it is when that meaning fits the context, or the occasion. Perhaps, by way of illustrating my meaning, I may be permitted to refer to a passage in the writings of one of the most popular authors of the last century, where a striking contrast is drawn between charity, in its vulgar sense, and a gift, for purposes which the law of England, rightly or wrongly—wrongly, as some think—considers charitable. In one of his essays, Goldsmith tells the story of a French priest at Rheims, so miserly in his habits that he went by the name of "The Griper." Working incessantly in his vineyard, steadily refusing to relieve distress, he managed to save a large sum of money. Then the writer adds: "This good man had long perceived the wants of the poor in the city, particularly in having no water but what they were obliged to buy at an advanced price; wherefore, that whole fortune which he had been amassing, he laid out in an aqueduct, by which he did the poor more useful and lasting service than if he had distributed his whole income in charity every day at his door." No one can misunderstand the meaning of the word there. But the Act of 1842 has nothing to do with casual almsgiving or charity of that sort. Nor indeed has it anything to do with charity which is not protected by a trust of a permanent character. The provisions of the Act which your Lordships have to consider are concerned with the revenues of established institutions—the income of charitable endowments. Such endowments, as I have already pointed out, form, according to English law, a distinct class of trusts, standing by themselves, and owe their validity in each case, if the trust is a perpetuity, to the fact that the purposes are charitable in the eye of the law.

Then, I ask, to whom is the Act speaking? In one sense, no doubt, it is speaking to all concerned. But it is addressed, I think, specially to that body under whose "cognizance and jurisdiction," to use the words of the Act, these particular allowances and exemptions are placed. All applications for these allowances and exemptions are to be made not to the General Commissioners

in their respective districts but to the Special Commissioners, and "at the head office for stamps and taxes in England." This is an express direction with reference to exemptions under Sched. C, and having regard to sect. 188 the same rule must hold good in all cases. So that in no case can the question come before any board or any commissioners in Scotland. Practically the Special Commissioners are identical with the Board of Inland Revenue, who now represent the Commissioners of Stamps and Taxes named in the Act of 1842. How are the authorities at Somerset House to determine what constitutes a trust for charitable purposes? The majority of the Court of Appeal tell them they must be guided by the popular meaning of "charity," and that "each individual case must be decided on its own facts." There is certainly no indication in the Act that such a hopeless task as that was laid on the Special Commissioners. They have to satisfy themselves that the income in respect of which exemption is claimed is applied solely to charitable purposes, and they are told how that is to be proved. But the question, charity or no charity, if you accept the contention of the respondent, is determined for them by the law of the country in which they sit to exercise their jurisdiction. In the case of *Baird's Trustees* (1), the Lord President observed that such a construction "would have a most disturbing and confusing effect." With the utmost deference, it seems to me the only way to ensure uniformity in the administration of the Act.

On these grounds I have come to the conclusion that the expression "trust for charitable purposes" in the Act of 1842, and the other expressions in the Act in which the word "charitable" occurs, must be construed in their technical meaning according to English law.

Although I rest my opinion on these broad grounds, it is, I think, satisfactory to find that every consideration to which the case has given rise, if examined closely, confirms this view, and that there is no indication in the Act pointing in the opposite direction.

In the first place it is plain on the very words of Sched. A, that the Legislature considered the purposes of a public school

(1) 15 Sess. Cas. 4th Series, 682.

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to be charitable, and a public school to be a trust for charitable purposes, just as much as an almshouse or a hospital. This seems to me to be enough to displace the narrow view of the Court of Session.

Then, as Fry L.J. points out, every expression in the first provision which I have read from Sched. A is a legal expression. But the argument may be carried further. Turn to the parallel passage in the Act of 1806 from which the Act of 1842 is copied. There the words are "on the rents and profits of messuages, lands, tenements, or hereditaments, belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes." In that passage every expression is a legal expression, and what is more to the purpose, a legal expression according to English law. There is no trace of Scotch legal phraseology there. I am not sure that the omission of the word "messuages" and the introduction of the word "heritages" may not have had something to do with creating the difficulty which your Lordships have now to solve. It seems to me too that the expressions in Sched. C "decree, deed of trust, or will" more properly belong to English legal phraseology than to Scotch. "Deed of trust" indeed is common to the legal language of both countries. But the word "decree" I think points primarily to the decrees of the Court of Chancery, by which no small proportion of the charities in this kingdom have been established, and I rather doubt whether the word "will" would have been used there as it is, if due attention had been paid to the language of Scotch lawyers.

There was an argument which appears to have had great weight with one of the learned judges in the Court of Session, to which I cannot attach much importance. That learned judge points out that in Sched. C there is a special exemption in favour of funds dedicated to the repair of cathedrals, colleges, churches, and places of worship. From that he infers that such purposes are not charitable within the meaning of the Act, and so, "without going outside of Sched. C," he finds a construction conclusive, as he thinks, in favour of the claim of the Crown. But, my Lords, in construing any document, it is not well to confine your

attention to an isolated passage. It seems to me to be necessary to go outside of Sched. C in order to understand the Act. If you turn to Sched. A, and to Sched. D, you will observe that these special exemptions are not to be found in either. So that if that learned judge is right we have this singular result:—If property devoted to these special purposes is in land, income-tax attaches. If the land is taken by a railway company and there is an interim investment in consols, or if the property is in any Government funds, home, foreign, or colonial, it is exempt; in any other form of investment it is subject to income-tax. Why should a premium be offered for the investment of money intended for church repairs in the funds of foreign or colonial governments? A construction which leads to a result so whimsical ought not, I think, to be adopted without good reason. It is not so very uncommon in an Act of Parliament to find special exemptions which are already covered by a general exemption. Nor is surplusage or even tautology wholly unknown in the language of the Legislature. On the other hand, if the legal meaning of the expression "charitable purposes" be adopted, there may be a superfluous expression here or there, but the Act will be consistent throughout.

No argument can, I think, be founded on the special exemption of the British Museum. The clause relating to the Museum, which is also to be found in the Act of 1806, is obviously out of its place, and was probably introduced at the instance of the trustees of the Museum. It was necessary as regards the buildings and premises in the actual occupation of the Museum chargeable under Sched. A, and that being so, it was natural, and not, I think, improper, that the exemptions to which the Museum would be entitled, as a charitable institution, under Sched. C, should be also specially mentioned.

A strong confirmation of the view which I am presenting to your Lordships is, I think, furnished by the income tax section of the Charitable Trusts Amendment Act 1855. The Charitable Trusts Act 1853, which established the Charity Commission, provided for the transfer of charitable funds to official trustees, of whom the secretary to the Commission was one. It appears from a Parliamentary Paper ("Charities," 1865), which

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contains a correspondence between the Board of Inland Revenue as Special Commissioners of Income Tax, and the Treasury, on the subject of income tax on charities, that it was the practice of the Board to give exemption to all stock standing in the names of the official trustees of charitable funds without further inquiry. This practice was confirmed, and the principle was carried still further by the Charitable Trusts Amendment Act, 1855, which enacts (sect. 28) that "all dividends arising from any stock in the public funds standing in the names of the official trustees of charitable funds, and which shall be certified by the Board" (that is the Charity Commissioners) "to the Governor and Company of the Bank of England to be exempt from the property or income-tax, shall be paid or carried to the banking account of the official trustees, without any deduction of such tax, and all dividends arising from any stock in the public funds standing in any other names or name, and which the Board shall certify to the Governor and Company of the Bank of England to be subject only to charitable trusts, and to be exempt from such tax, shall be paid without any deduction thereof." By virtue of this enactment, the income of a large proportion of the funds devoted to charity in this country, exceeding in amount for the year 1865 one million-and-a-half, and now probably much larger, was entirely withdrawn from the cognizance and jurisdiction of the Board of Inland Revenue. Thenceforth, for the purposes of the Income Tax Acts, as well as for the purposes of administration, that income has been under the jurisdiction of a body bound by law to construe the expression "charitable trusts" according to its legal meaning, and to give certificates of exemption in accordance with that construction. The obligation is clear. The Charitable Trusts Amendment Act 1855 is to be construed as one Act with the Charitable Trusts Act 1853, and the Act of 1853 contains a definition of "charity" by reference to the Act of Elizabeth, and the practice of the Court of Chancery. I may add that sect. 28 of the Act of 1855 has always formed part of the Income Tax Code whenever the tax has been reimposed, carrying with it into the code, to a certain extent at least, the legal definition of "charity."

I cannot help reminding your Lordships, in conclusion, that

the Income Tax Act is not a statute which was passed once for all. It has expired, and been revived, and re-enacted over and over again; every revival and re-enactment is a new Act. It is impossible to suppose that on every occasion the Legislature can have been ignorant of the manner in which the tax was being administered by a department of the State under the guidance of their legal advisers, especially when the practice was fully laid before Parliament in the correspondence to which I have referred ("Charities," 1865).

It seems to me that an argument in favour of the respondent might have been founded on this view of the case. The point of course is not that a continuous practice following legislation interprets the mind of the Legislature, but that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning. And perhaps it might be argued that the inference grows stronger with each successive re-enactment. However, as the point was not dealt with at the Bar, I forbear to express any opinion upon it.

With the policy of taxing charities I have nothing to do. It may be right, or it may be wrong; but speaking for myself, I am not sorry to be compelled to give my voice for the respondent. To my mind it is rather startling to find the established practice of so many years suddenly set aside by an administrative department of their own motion, and after something like an assurance given to Parliament that no change would be made without the interposition of the Legislature. In 1865 the Treasury communicated to Parliament the fact that they had come to the conclusion that the subject was "one which should be reserved to be dealt with by the Legislature, and that in the meantime the practice which has hitherto prevailed should be followed." For such a conclusion, even if the claim of the Crown had been originally well-founded, there would be much to be said. The Legislature declaring the law can at the same time grant immunity for the past; but a change of practice, established by judicial decision only, would leave the bulk of the charitable foundations in this country exposed to liabilities appalling in amount.

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I am, therefore, glad to find that the claim of the Crown is based on what seems to me to be a very superficial view of the meaning of the Legislature, and my opinion is that the appeal should be dismissed with costs.

LORD MORRIS:—

My Lords, I have had an opportunity of reading and fully considering the judgment which has just now been announced by my noble and learned friend, Lord Macnaghten, and I can only add that I concur unreservedly in the reasons he has given and in the result he has arrived at.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 20th July 1891.

Solicitors for appellants: *Sir W. H. Melvill, Solicitor of Inland Revenue.*

Solicitors for respondent: *Francis & Calley.*

[HOUSE OF LORDS.]

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BANK OF SCOTLAND . . . . . APPELLANTS;

AND

DOMINION BANK (TORONTO) . . . RESPONDENTS.

Bill of Exchange—Payment and Discharge—Cancellation without Authority—Liability of Agent employed to collect Bill.

Where an agent is employed by the holder of a bill to receive payment of it from the acceptor, and receives payment from him clogged with a condition without assent to which the holder is not entitled to retain the money paid, the agent is not entitled to treat such conditional payment as if it were an absolute payment, and to cancel the bill as paid before he has received the assent to the condition.

The agent of a bank offered to try to obtain payment of a bill which had been protested for non-payment, and the holders accepted the offer. The acceptors offered to pay the bill, and the protest charges on the condition that they should not be called upon to pay interest and expenses. The bank's agent communicated this condition to the holders, and without waiting for authority took payment of the bill and protest charges, marked

the bill paid and delivered it to the acceptors, who deleted their names thereon. Thereafter the holders intimated their refusal to agree to the conditions on which payment had been made, refused to accept the sum tendered to them by the agent of the bank, and received back the bill cancelled. They then raised an action against the acceptors for the amount of the bill, with interest, and for the expenses of the action, and obtained decree, but the acceptors became bankrupt. The holders thereupon raised an action against the bank concluding for the amount of the bill, with interest, and for the expenses of their action against the acceptors :—

Held, affirming the decision of the Court of Session (16 Ct. Sess. Cas. 4th Series (Rettie), 1081), that the bank was liable; but was entitled to an assignation of the rights of the holders against the drawers of the bill.

APPEAL from a judgment of the First Division of the Court of Session of Scotland (1).

The action was brought by the Dominion Bank, Toronto, the respondents, against the Bank of Scotland, the appellants, for the amount of a bill of exchange, with interest, and for the expenses of an action against Messrs. William Anderson & Co., merchants, Grangemouth, the acceptors of the bill, who had become bankrupt. The grounds of the action were that the appellants allowed the bill to be improperly cancelled, and thus the holders were not able to charge upon it, which if they had been able to do at the date of the action against Anderson & Co., they would have recovered payment.

Messrs. McArthur Brothers, timber merchants, Toronto, Canada, sold timber to Messrs. Anderson & Co., of Grangemouth, and for its price the bill was drawn by the former and accepted by the latter for £2939 9*s.* 6*d.* The bill was dated the 28th of September, 1886, and made payable at the London office of the Bank of Scotland on the 7th of May, 1887. It was indorsed for value by the drawers to the respondents, who transmitted it for collection at maturity, to the National Bank of Scotland, London. It was presented for payment on the 7th of May, 1887, when payment was refused and protest taken. It appeared that a dispute had arisen between Anderson & Co. and Messrs. Carswell & Co., McArthur Brothers' agents in this country, as to the payment of £95 in respect of some complaint as to the cargo of timber. On the 10th of May, 1887, the bill was returned to Canada to secure

(1) 16 Court Sess. Cas. 4th Series (Rettie), 1081.

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recourse against the drawers. In the meantime, it appeared as if the dispute as to the £95 had been settled, and on the 16th of May, Mr. Mackenzie, the appellants' agent at Grangemouth, with whom Anderson & Co. kept their account, wrote to the National Bank of Scotland, London: "If the matter be now adjusted, you might send forward the document for collection."

The National Bank replied that if the amount and charges were remitted they would recall the bill.

On the 21st of May, 1887, Mackenzie wrote: "With reference to my letter of the 16th inst., if the bill £2939 9*s.* 6*d.* be sent on here for collection it will in all likelihood be paid, but not the expenses, as the fault was not on Messrs. W. Anderson & Co.'s side, at least so they say." On the 28th of the same month he again wrote that he inclosed a letter from Messrs. Anderson & Co., and to favour him "with their instructions," and "that Messrs. W. A. & Co. think they have been harshly treated by the drawers." The inclosed letter was addressed to the Bank of Scotland, Grangemouth, and was as follows: "Confirming our former instructions to you; it just now occurs to us that immediate payment might be made, provided the National Bank, London, gave a guarantee to hand over the bill to you on its return, and hold us scatheless in the event of its miscarriage in any way whatever; also freeing us from all expenses and interest. On hearing you have received such guarantee, we will instruct you to pay."

The bill had now returned from Canada, and on the 7th of June, 1887, the National Bank wrote to Mackenzie: "Referring to your letter of the 21st ulto., we now inclose for collection and remittance through your London office bill, &c. . . . Should the acceptors decline to pay protest charges, 12*s.* 6*d.*, please return protest to us. Acceptors will of course pay the remitting charge."

No note of any claim for interest, or for the expenses of sending the bill to Canada, was attached or inclosed.

In reply, Mackenzie wrote on the 9th of June, 1887: "With reference to your letter of the 7th inst., I inclose herewith a communication received from W. Anderson & Co., from which you will observe that they would pay the 12*s.* 6*d.*, together with

the remitting charge re the bill, on condition that they were held free of further responsibility. Please favour me with your instructions. P.S.—As Mr. Anderson is presently living at Callander, and may not be here till Monday morning, we retain the bill till that day, if we have not contrary instructions from you."

The letter from Mr. Anderson was: "We have yours stating the National Bank, London, will take payment of this bill, but we would like you to get a letter from them freeing us of interest and expenses, as asked in ours of the 28th ulto. The way we have been treated in the past is our excuse for being somewhat particular now."

The question, therefore, at that stage of the contest was merely whether Anderson & Co. were liable for the interest charges, £22 10*s.*, and expenses because of the non-payment. It was admitted that there was ample time between the receipt of the letter of the 9th of June and the 13th of June, to send Mackenzie further instructions, but he received none. What took place in London was that the National Bank on getting the 9th of June letter, cabled to the respondents in Canada: "Anderson will only pay on receiving our indemnity freeing them from further liability."

On Monday, the 13th of June, Mackenzie took payment of the principal of the bill and protest charges. It appeared from the evidence that on Mr. Anderson presenting himself to pay, he asked could he get a guarantee to hold him free of expense, and that Mr. Mackenzie said "No," and that the letter of the 7th of June contained the only conditions on which he could give up the bill. Mr. Anderson then paid the money. The teller (Galloway), perforating the bill with the word "paid," handed it across the counter to Mr. Anderson, who then and there ran a pen through the signature. About an hour and a half afterwards Mr. Anderson came back, and gave the following letter to Mr. Mackenzie, addressed to the appellants, which he asked to be forwarded to the National Bank: "Confirming our former respects we hand you payment of this bill on the distinct understanding that we are freed from all responsibility for interest, expenses, &c."

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On the same day Mr. Mackenzie wrote to the National Bank:—

"I beg to enclose draft for £2940 2*s.*, being amount of W. Anderson & Co.'s acceptance referred to in your letter of the 7th inst., with 12*s.* 6*d.* protest charges. Of course you distinctly understand, in accordance with Messrs. Anderson & Co.'s letter herewith enclosed, that, so far as that firm is concerned, the draft is accepted by you in settlement of the transaction, without any reservation."

On the 14th the National Bank wrote saying they had cabled to Canada whether they could give the indemnity, but as yet had received no reply, and that in the meantime they had not negotiated the draft.

On the 18th of June the National Bank returned the draft in a letter in which they informed Mr. Mackenzie that they had had a communication from Carswell & Co., the drawers' agents, asking if the bill had now been paid. The letter concluded "As our friends have not authorized us to take payment of the acceptance on the conditions tendered, we return your draft £2940 2*s.*, and shall thank you to return us the bill."

On the 23rd of June they telegraphed to Mackenzie, "Is it clearly understood that the conditions mentioned in Anderson's and your letters of the 9th of June are withdrawn? If so, return draft." On this Mr. Mackenzie again sent back the draft, but repeated the condition contained in the letter of the 13th of June, and added, "In my opinion, your friends should at once close the transaction."

On the 24th of June the draft was finally returned, and as Mr. Mackenzie had mentioned the bill had been perforated with the word "paid," the National Bank asked for a letter that it was cancelled in error, adding, "In originally remitting us this draft you should not as our agents have parted with the bill until you had received our consent to the conditions laid down in your letter."

On the 12th of July, Anderson's agents wrote to the law agents of Carswell & Co.—McArthur Brothers', agents—that if they were prepared to state that there were no further claims for interest and expenses, Mr. Anderson was willing to pay the money.

The bill being ex facie cancelled, the holders could not use summary diligence, and an ordinary action grounded on sect. 63, sub-sect. 3, of the Bills of Exchange Act, 1882, was rendered necessary. The respondents raised this action against Anderson & Co. on the 12th of July, 1887. On the 10th of February, 1888, a final decree against Anderson & Co. was granted (1), but before that decree could be put into force Anderson & Co. became bankrupt (15th of March, 1888). The debt due on the bill was never paid with the exception of £161, being a dividend of 1*s.* in the pound.

In these circumstances the respondents on the 11th of June, 1888, raised this action against the appellants concluding for payment of the bill with interest and for the expenses of the action and diligence against Anderson & Co. The National Bank's clerk (Gordon), who conducted the correspondence with Mackenzie, swore that they, the National Bank, did not ask payment in the letter of the 7th of June of either interest or charges; they asked for payment of the principal and if possible of the protest charges. And that they were willing to take payment of the principal, leaving the question of charges to be otherwise arranged; desiring to secure the principal in the meantime.

On the 28th of November, 1888, the Lord Ordinary (Lord Fraser) held that the appellants were liable. On the 19th of July, 1889, the First Division adhered (Lord Mure dissenting) (2). The reasoning of Lord Mure's judgment was that even if the respondents could have taken summary diligence on the bill when they resolved, 7th of July, 1887, to proceed against the acceptors, they had not proved that they would have been successful in receiving the amount of the bill.

On appeal,

June 8, 9. *Finlay*, Q.C., and *A. Graham Murray* (of the Scotch Bar), for the appellants:—

The only grievance upon which the respondents could rely was the cancellation of the bill. It was admitted that they could not

(1) 15 Court Sess. Cas. 4th Series (Rettie), 408.

(2) 16 Court Sess. Cas. 4th Series (Rettie), 1081.

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complain of the giving up of the bill. The letter of the 7th of June contained no directions to reserve for future arrangement the question of payment of the interest and charges; and on the other hand, Anderson's letter stipulating that they should be freed from responsibility in respect of these items was unnecessary, and merely sent out of courtesy, for there was no legal right to interest after the bill of exchange had been delivered up as paid. Assuming, therefore, that interest could not be recovered, there was in the result no difference between what Mackenzie did, and what the respondents' agent intended him to do. It must follow that the respondents were not entitled to substantial damages; but only, if to anything, to the interest, £22 10s. and the charges. Nor could the loss be said to be the direct or natural consequence of the error or fault of the appellants' agent. The respondents' agents, knowing what Mackenzie was going to do, never answered his letter of the 9th of June. Then as to the loss of summary diligence—so late as the 12th of July, after they knew the bill had been cancelled, and therefore that the remedy by summary diligence had gone, they had a chance, which they neglected, of getting the full principal paid. Again, the respondents never explained why they did not apply to, or sue, the drawers in Canada: *Van Wart* v. *Woolley* (1).

Sir *R. E. Webster*, A.-G., the *Dean of Faculty* (*J. B. Balfour*, Q.C.), and *H. Tindal Atkinson*, appeared for the respondents, but were not called upon further than to state that the respondents were quite willing to assign to the appellants any right and remedy which they might have against the drawers in Canada.

EARL OF SELBORNE:—

My Lords, I confess it is with some regret, because I think the case is rather a hard one upon the Bank of Scotland, that I feel myself compelled to come to the conclusion that the judgment in this case is right; though I think it should be amended, without prejudice to the costs of the appeal, by introducing words which will require effect to be given to the offer which was made in the

(1) 3 B. & C. 439.

Inner House to subrogate the appellants to any right and remedy which may remain upon the bill against the drawers.

In the view which I take of the case, it may be put thus: First of all, has there been a loss sustained? It is clear that there has been a loss, arising, no doubt, immediately from the bankruptcy of the judgment debtor; and for this purpose I cannot but think that this case should be dealt with upon the footing of the right of the holder of the bill against the acceptor, without reference to the question whether an action against the drawers in Canada might have been successful or not, or to what extent. There has been an actual loss arising immediately from the bankruptcy of the judgment debtor; and that the measure of that loss primâ facie is that which the Court below have assumed appears to me to be unquestionably clear.

Then, my Lords, what was the cause of that loss? I think, (differing here from Lord Mure, but agreeing with the rest of the Court), that the cause of the loss was the delay of the remedy, which would have been speedy and summary if the bill had not been on the face of it cancelled. I cannot think that more evidence than was given as to the possibility of having made that summary remedy effectual, if it had existed, can be required. The debtor was a man engaged in business, carrying on business, paying his way, and paying considerably larger sums, according to the evidence, than that in question, until some considerable time after the action was brought; and it appears that on the 12th of July, 1887 (a matter which is not noticed by Lord Mure in his judgment), a positive offer was made to pay down immediately—that is, the next day—the whole principal sum due upon the bill, on the condition of a waiver of the right to the interest.

My Lords, I will consider hereafter whether the refusal of that offer has any effect upon the pursuers' right; but I think that, in that state of circumstances, your Lordships must come to the conclusion that payment would have been made but for the question which was raised as to the interest; and if the summary remedy had been available at that time, it cannot be doubted, from the correspondence which then took place, that it would have been immediately resorted to; and I understand the law of Scot-

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land to be, that if a party is let in to defend in such a case, it must be upon the terms of consigning the amount claimed, or, at least, giving good security for it. Therefore primâ facie the loss is proved, and is due to the delay of the remedy. It is not suggested that the action was not proceeded with as rapidly as it could have been, or that there was any default of any sort or kind in prosecuting it on the part of the pursuers.

My Lords, that brings us to the question, What was the cause of the loss of that summary remedy? If we find that it was due to a wrongful act on the part of the defenders, the loss was the direct consequence of that wrongful act. The cause was, beyond all doubt, the cancellation of the bill—that is to say, the perforation of it as paid, which was the act of the defenders by their agent, Mr. Mackenzie, and also the simultaneous erasure of the signature by the acceptor. Then the sole question, as it strikes my mind, is whether that was a wrongful act or not. If it was a wrongful act when it was done, I am afraid the consequence is that the defenders must be liable for the loss so occasioned.

In determining whether it was a wrongful act or not, I think that we must look to what took place upon the 13th of June, 1887, and not at what might or might not possibly have taken place if action had been taken upon letters which passed at an earlier date. And what did take place on the 13th of June? This, that the principal money and the amount of certain small charges were paid to Mr. Mackenzie, the agent of the Bank of Scotland, on a certain condition. The condition was, that there should be an express renunciation or waiver of any further claim for that which was not paid; in other words, that payment of part of the debt should be accepted and the rest discharged, and that positively, by an express engagement.

Both Mr. Mackenzie, representing the Bank of Scotland, and Mr. Anderson, who made the payment, knew perfectly well that there was no authority to accept payment upon those terms. The letters written contemporaneously, which, in my opinion, must be taken to represent the true effect of the actual transaction (and I should think so independently of a circumstance not altogether immaterial, namely, that the Bank of Scotland were also the bankers of Anderson, the debtor), shew that it was a

conditional payment made upon those terms; and on whatever other conditions the preceding correspondence might possibly have authorized such a payment to be received, it did not authorize the acceptance of those terms. The letters prove it distinctly; the whole sequel of the correspondence proves it; Anderson's letters previous to that date shew that the thing was deliberate, and that he never would have paid upon any other terms; and the letter of Mr. Mackenzie proves that he knew perfectly well that there was no previous authority to accept payment upon those terms, and that if those terms were not accepted the payment could not in good faith, or in point of law either, I should say, be retained. Consequently, the terms not being accepted, the payment was returned, and redelivery of the bill was asked for.

Now, the question, to my mind, is, Could it be justifiable, under those circumstances, and upon such a conditional payment being made, instantly to cancel the bill, to perforate it as paid, and to stand by while the signature of the acceptor was erased by him, and leave it so in his hands? To me it is plain that until the terms were accepted, and the condition assented to, it could not be consistent with the duty of the bank to part with the bill or to permit it to be tampered with. It might have been put in medio under some reasonable arrangement, leaving it capable of being returned as it was before, when the money was returned if the condition was not accepted. That, however, was not done; and I cannot think it is any answer to the case so made, that a somewhat ambiguous letter had been written upon the 7th of June, which, especially when taken in connection with Mr. Gordon's evidence, seems to shew that the National Bank, the agents of the creditor, would have been willing to accept payment of the same amount upon other terms—upon the terms either of something being done expressly to save the right to claim and recover the interest due and not paid, with any other charges which might lawfully be made, or at least of leaving that question untouched by any express waiver or renunciation. I do not think it necessary to go into the question what the true construction and effect of that letter would have

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been if it had been treated at the time as an authority to deliver up the bill upon payment of that sum, because the transaction did not follow upon it. There may have been, perhaps, some difference of view between the National Bank of Scotland and Mr. Mackenzie as to the effect of that letter. Whichever was right or whichever was wrong, one thing is to my mind quite clear from all that followed, namely, that the National Bank of Scotland did not mean to renounce that, upon the renunciation of which Mr. Anderson distinctly insisted; and, on the other hand, that Mr. Anderson would not and did not make any payment except upon the terms of that renunciation, which was never agreed to and was never intended to be agreed to.

That being, as it appears to me, the whole substance of the case, I am unable to follow the argument founded on the fact that on the 13th of June, and at a later date, on the 12th of July, payment of part was offered on condition that the rest was remitted or renounced. I cannot see how, if at the time that those proposals were made there was no obligation to accept them, the fact of the ultimate loss can be affected, or that loss reduced, by reason of those proposals. If they ought to have been accepted, it would be quite a different thing; but can any one seriously say that either in a question with the agent to collect, or in a question with the principal debtor, the principal debtor has a right to reduce the amount of the debt, or that the agent to collect has a right to treat the amount of the debt as reduced by an offer to pay less than the whole? Though the amount of the difference may not be large, yet if the tender was not such a tender as there was an obligation to accept, I am at a loss to see how it can affect the ultimate result.

On these grounds—and I think it unnecessary to say more—I have come to the conclusion that the Court of Session was right, and that their judgment should be affirmed, with costs; altering the interlocutor only by adding the words which will be necessary to make it part of the judgment, that there is to be an assignation to the appellants of any remedy competent to the respondents against the drawers of the bill of exchange; and I move accordingly.

LORD WATSON:—

I am of the same opinion upon all of the points which have been dealt with by the noble and learned Earl on the Woolsack.

The letters containing the instructions sent by the National Bank in London to the agent of the Bank of Scotland at Grangemouth are certainly expressed in terms somewhat loose; and if, following out the authority given by these letters, Mr. Mackenzie had bonâ fide, as the authorized agent of the National Bank, entered into a final and binding arrangement with Mr. Anderson which could, by some reasonable construction of these letters, have been justified, I should not have been prepared to construe the letters very strictly against Mr. Mackenzie or the bank which he represented. I think that they would have admitted of very considerable latitude. But what Mr. Mackenzie actually did do on the 13th of June, 1887, was not anything of that kind. He then made an arrangement which he knew he had not power to make finally; because a condition insisted upon as essential by Mr. Anderson, and without which Mr. Anderson would make no arrangement at all, was known to Mr. Mackenzie to be one to which the National Bank had given him no authority to consent; and accordingly in reporting the arrangement he calls the attention of the bank to that fact and points out that it is made a sine quâ non by Mr. Anderson.

The subsequent letters shew that according to Mr. Mackenzie's view the arrangement was provisional, that it was in the option of the Dominion Bank, or their agents in London, to assent to it or not, and that its completion depended upon their giving their assent. That was all very right and proper, and to that extent no fault can be found with Mr. Mackenzie's action. But the matter in which he did exceed his powers and commit a legal wrong was in relation to the mutilation of the bill. He had no right to perforate the signature, or to permit any other person to interfere with the document, which was the property of the Dominion Bank. He had no right to do that, so long as the Bank had not intimated their assent to the arrangement, under which alone either Mr. Mackenzie or any other person could have authority to mark it as discharged.

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My Lords, I do not see any reason to doubt that in that view of the case the results which followed were the direct and natural consequences of Mackenzie's wrongful act. I think the judgment of the Court below is right, and ought to be affirmed with the variation suggested by the noble and learned Earl.

LORD BRAMWELL :—

I am of the same opinion. I am very much inclined to think that the construction put by the appellants upon the letter of the 7th of June is the right one; and if nothing else had happened except that, and Mackenzie had been content to take the principal without interest, I am very much inclined to think that he would have been justified in giving up the bill to be cancelled; and in point of fact I believe that was the agreement which he originally made with Anderson. But, whether from a feeling of goodwill to Anderson, who was a customer of the bank, or from any other consideration, he told the National Bank that that was not all that took place between them, because he in effect told them that Anderson's letter was a truthful one, and that he, Mackenzie, had taken the money upon the footing that the Dominion Bank was to have no further claim in respect of the bill. It is very ingeniously argued that that really did not add to what would have been the case if nothing had been said expressly about the Dominion Bank having no further claim in respect of the bill. I am sure I do not know about that, but it took away from the Dominion Bank the power of trying whether they had such further right, and it therefore, if it really had been agreed to, was an excess of authority on the part of Mackenzie, and I think that he is precluded from saying that that was not really agreed to, although in fact I doubt extremely whether it was, for I doubt whether Mr. Galloway's evidence is not right.

My Lords, if that is so, Mr. Mackenzie added a term to the agreement with Anderson which he had no authority to add, and therefore he acted without authority in giving up the bill in pursuance of an agreement which he had no authority to make. That is the first position.

I have had a misgiving, I own, whether the damage arising

from the inability of the Dominion Bank to have recourse to the summary procedure, and the intervening bankruptcy of Anderson, was damage naturally arising out of the wrong thing which Mackenzie did. But I cannot but think that some damages arose from it; and although it can hardly be said to be a natural consequence of the wrong that Mackenzie did, and of the mistake which he made, yet the insolvency of Anderson and the necessary delay in the procedure together undoubtedly caused a loss of money; at least, I think upon the evidence (with all submission to Lord Mure) that it would have been recovered if there had been the possibility of summary procedure. I had a strong opinion that the pursuers had not made out their damages, because they had left it in uncertainty what they would recover, if anything, from the drawers of the bill; but that difficulty is got over by what I understand can be done in the decree which can be pronounced now. But I should just like to make this suggestion: the bill may be handed over to the appellants, but ought there not to be some provision by which they should be enabled to prove notice of dishonour to the drawers of this bill, which no doubt was given by the Dominion Bank in Canada? I should think there ought to be some provision or arrangement by which the Dominion Bank should undertake to enable the present appellants to prove all that the Dominion Bank could have proved to enable themselves to recover. Whether that can in any way be done or not I am sure I do not know; I merely make the suggestion that in some way or other it ought to be done or agreed to.

LORD HERSCHELL:—

My Lords, I am of the same opinion.

I do not propose to trouble your Lordships with any observations as to the effect of the letter of the 7th of June. I think it quite possible that under the terms of that letter the Bank of Scotland would have been entitled to receive from Anderson the principal and the small charges, without commission or interest, and to take them from him possibly (I do not wish to determine that point at all) without making any reservation whatever, nothing being said on either side, if Anderson had

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been content to make the payment on those terms. But it is clear to my mind that Anderson never was content to make the payment on those terms. Whether he shared a common mistake with the National Bank or not, it seems to me manifest that he always insisted that he would only make payment of the principal if there were a distinct and express renunciation by the holders of the bill of their remedy in respect of anything further. I do not see any ground for thinking that he ever receded from that position. He had taken it from the outset; he took it on the 9th of June; and I cannot myself see any ground for supposing that he did not take it on the 13th, inasmuch as it was embodied in the letter which he wrote on that day.

Now, my Lords, as I have said, I will assume that if Mr. Mackenzie had handed over the bill after he got the letter of the 7th of June, and had received the principal and the 12*s.* 6*d.*, the other small charges, no complaint could have been made. But that did not take place. Anderson was not willing that it should take place, because Anderson said, "I am not content with that; I want an express renunciation." Then on the 13th I think it must be taken as against Mackenzie (and I have no doubt myself that it was the fact, but even if it was not the fact it must be so taken as against Mackenzie) that that was the transaction, because it is upon those terms alone that he sends up the draft to London.

Now, the ground upon which I base my judgment in the case is this, that where a banker is employed to receive payment of a bill from the acceptor, and receives payment from him clogged with a condition without assent to which the holder is not entitled to retain the money paid, I think the banker cannot be entitled to treat such conditional payment as if it were an absolute payment, and to cancel the bill as paid before he has received the assent to the condition. It seems to me that where he has transmitted the money to his principal upon the distinct terms that the principal cannot be justified in keeping it absolutely and in all events, but can only keep it properly if he assents to a condition imposed by the letter remitting it, then he was bound to hold in his own hands the acceptance sent him for collec-

tion untouched and untampered with, until he had ascertained whether his principal was willing to assent to the condition or not. Not having done so in this case, it seems to me that he has committed a breach of duty from which the damage sued for has resulted.

Ordered and Adjudged, *Interlocutor of the* 19*th of July*, 1889, *be varied, by adding thereto, after the words "refuse the reclaiming note," the following words: "And the pursuers having undertaken to assign to the defenders any remedy which they may have against the drawers of the bill of exchange of the* 28*th of September*, 1886, *order such assignation to be duly made, and the said bill of exchange to be delivered up to the defenders for the purposes thereof, upon payment by the defenders to the pursuers of the amount decerned in this action." Further* Ordered, *that the said interlocutor of the* 19*th of July*, 1889, *subject to this variation, as also the interlocutors of the* 28*th of November*, 1888, *and the* 14*th of December*, 1889, *be affirmed; cause remitted to the Court of Session; appellants to pay the costs of the appeal.*

Lords' Journals, 9th June, 1891.

Agents for the appellants: *Loch & Goodhart, for Tods, Murray, & Jamieson, W.S. Edinburgh.*

Agents for the respondents: *Murray, Hutchins, & Stirling, for Mackenzie, Innes, & Logan, W.S. Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1891 June 16.

WHYTE (PAUPER) . . . . . APPELLANT;

AND

THE NORTHERN HERITABLE SECURITIES INVESTMENT COMPANY, LIMITED, AND OTHERS . . . . . RESPONDENTS.

Bankruptcy—Scotch Law—Casus improvisus—Nobile Officium—Discharge of both Trustee and Bankrupt—Re-appointment of a Trustee—Bankruptcy (Scotland) Act, 1856 (19 & 20 *Vict. c.* 79, *ss.* 102, 103, 132, 152, 155—*Competency.*

The Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), s. 152, provides for the discharge of a trustee in bankruptcy "after a final division of the funds," but contains no express provision for the appointment of a new trustee after such discharge has been granted by the Court.

Certain creditors upon a sequestrated estate on which both the trustee and bankrupt had been discharged, the latter without composition, presented to the Court of Session a petition for a remit to the Lord Ordinary on the bills to appoint a meeting of creditors for the election of a new trustee, averring that there were funds belonging to the sequestrated estate which had not been recovered, and that the petitioners had not been paid their debts in full. There was no concealment or fraud alleged. The bankrupt opposed the petition and claimed the funds. The Court of Session made the remit as prayed:—

Held, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series (Rettie) 100), that the Court of Session had jurisdiction to make the order, it being merely machinery for giving effect to the rights of the creditors under the Act, and according to the settled practice of that Court.

APPEAL from the First Division of the Court of Session, Scotland (1).

This was a question as to the power of the Court of Session to revive a sequestration after both the bankrupt and trustee have been discharged.

The estates of George Whyte, the appellant, were sequestrated on the 7th of June, 1882, and a trustee appointed. A certain

(1) 16 Ct. Sess. Cas. 4th Series (Rettie), 100.

spes successionis of the appellant to certain bank stock under the marriage contract of his parents was included in the return of assets.

On the 18th of March, 1884, the appellant obtained his discharge without composition. A dividend of 7½*d.* was paid in the pound. On the 4th of November, 1887, the trustee obtained his discharge. On the 18th of January, 1887, the mother of the appellant, his surviving parent, died. In December, 1887, the appellant raised an action against the Commercial Bank of Scotland and one Murray, for declarator in respect to the bank stock mentioned above. The Court of Session held that the appellant had a title to sue; that the bank stock was not carried by an assignation founded on by Murray, and upheld the conclusions of the appellant's summons, but without prejudice to any claims that might be lodged by the creditors upon the appellant's sequestrated estates (1).

In these circumstances the Northern Heritable Securities Investment Company, the respondents, with other creditors, presented a petition to the Court of Session for a revival of the appellant's sequestration and for a remit to the Lord Ordinary on the bills, to order a meeting of creditors for the election of a new trustee on the ground that funds—the above-mentioned bank stock—had emerged, which the creditors were entitled to. The appellant opposed the petition, contending (*a*) that the bank stock had not been carried to the trustee, but had vested in him at his mother's death, and never fell within the sequestration; (*b*) that the trustee and creditors had abandoned all their rights thereto by taking no steps between the death of the mother of the appellant, and the termination of the sequestration, the 4th of November, 1887; (*c*) that they had renounced their rights to these funds by being parties to articles of sale by auction dated the 18th of September, 1883, under which they were alleged to be sold to the above-mentioned Murray.

The respondents averred, there were primâ facie grounds for believing that there was estate which fell under the sequestration, and that there had not been abandonment, which, to be a bar, must be express on the part of the creditors in

(1) 16 Ct. Sess. Cas. 4th Series (Rettie), 95.

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favour of the bankrupt, of an asset known and ascertained at the time.

On the 21st of November, 1888, the First Division allowed the prayer of the petition. The late Lord President (Inglis) said: "All that is required to sustain such an application, in circumstances similar to the present, is that it shall be averred that there are funds belonging to the sequestrated estate; that the bankrupt has been discharged, not upon a composition, but only by reason of efflux of time, or by the consent of the creditors; and that the petitioners making the application shall be creditors who have not been paid in full."

On the 24th of November, 1888, the Lord Ordinary, by interlocutor, appointed a meeting of creditors for the election of a trustee. A meeting was held, and the former trustee (Mr. Robertson) re-elected, and his election was duly confirmed by the sheriff by a judgment dated the 18th of December, 1888.

The appellant appealed (1) against, inter alia, the interlocutors of the 21st and 24th of November, 1888, and the appeal was heard on the assumption that the fund in question fell under the sequestration.

June 16. *Haldane*, Q.C. (with him *John Kemp*, and *A. S. W. Thomson* (the latter of the Scotch Bar)), for the appellant:—

The Court of Session had no jurisdiction to reopen the sequestration after it had been finally closed with the discharge of the trustee. There is nothing in the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), to warrant the Court in assuming any such power. Secondly, it is not consistent with equity to exercise such a power after the creditors have stood by and allowed the appellant to expend his money on the recovery of the fund in question. [He commented on the Bankruptcy (Scotland) Act (19 & 20 Vict. c. 79), *Thomson's Case* (2), *Taylor* v. *Charteris*

(1) The appellant had also an appeal against the trustee, Robertson, from interlocutors of the Lord Ordinary dated the 9th of July, 1889, and of the Inner House dated the 11th of June, 1890 (see 17 Ct. Sess. Cas. 4th Series (Rettie), 895); but this second appeal eventually stood dismissed for want of the usual security for costs, the Appeal Committee having refused to allow it to be prosecuted in formâ pauperis.

(2) 2 Court Sess. Cas. 3rd Series (Macpherson), 325.

and Andrew (1), *Abel* v. *Watt* (2), *Fleming* v. *Walker's Trustees* (3), and *Whyte* v. *Murray* (4).]

A. Graham Murray (of the Scotch Bar), (with him, *Le Breton*), for the respondents, was not called upon, except as to the objection the respondents had taken to the competency of the appeal. As to this point, he admitted that it was only of a technical character. The appellant, averring that the Court of Sessions has acted ultrâ vires, should have proceeded, not by way of appeal, but by way of a suspension.

[The cases of *Galt* v. *Macrae* (5) and *Tennent* v. *Crawford* (6), in which the First and Second Divisions expressed opposite views with regard to the finality of the sheriff's appointment of the trustee, were referred to.]

EARL OF SELBORNE :—

The House is satisfied the appeal is competent, and that the question raised in *Galt* v. *Macrae* (5) and *Tennent* v. *Crawford* (6) is not touched upon by this case.

EARL OF SELBORNE :—

My Lords, this appears to me to be an extremely clear case. So far as relates to the first point on which the argument has turned, namely, the competency of the Court of Session to make an order in sequestration directing the necessary proceedings to be taken for the appointment of a new trustee of the bankrupt's estate, it appears that for the last thirty years, or nearly so, there has been a settled practice of the Court of Session to make such an order in the case of funds which have not been got in, or have not been distributed, at the time of the discharge of a trustee in bankruptcy; and though it might be possible that a practice which has continued for that period of time and, as I understand, has been followed in many cases, might be proved to

(1) 7 Court Sess. Cas. 4th Series (Rettie), 128.
(2) 11 Court Sess. Cas. 4th Series (Rettie), 149.
(3) 4 Ct. Sess. Cas. 4th Series (Rettie), 112.
(4) 16 Court Sess. Cas. 4th Series (Rettie), 95.
(5) 7 Court Sess. Cas. 4th Series (Rettie), 888.
(6) 5 Court Sess. Cas. 4th Series (Rettie), 433.

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be wrong, it is needless to say that the presumption is the other way, and that any one so alleging must, at all events with sufficient clearness, make out his case.

Well, the case, as I understand it, rests upon this proposition, that when a trustee has been discharged under the 152nd section of the Act of 19 & 20 Vict. c. 79, all funds at that time distributable in the bankruptcy (of course I put the case of fraud aside) and which have not at that time been distributed, vest by law in the bankrupt for his own benefit, although the creditors have not been paid twenty shillings in the pound, or interest on their debts; and that at all events, if that is not the necessary construction of the clause itself, the fact of there being no provision made in the statute, as to the machinery by which a new trustee is to be brought into existence in that case, is enough to prevent any one but the bankrupt from claiming and getting the benefit of those funds. I confess, my Lords, that I have had great difficulty in following that argument, having regard to the express provisions of the Act, as well as to the general purpose for which it was passed. The general purpose is to enable a debtor who cannot pay his way to get discharged upon the footing of giving up the whole of his property, and to distribute that property, as far as it will go, amongst the creditors. For the present purpose, (subject, of course, to any contest which may be raised elsewhere), it must be assumed upon the facts which we know that the fund in question was, at and before the time of the bankrupt's discharge, a part of his distributable estate under this sequestration. Supposing it was so, what is there to take away from the creditors the right to have it applied for their benefit? The 102nd section, the vesting clause, in the fullest and strongest terms vests, for the purpose of distribution, in the trustee, "for behoof of the creditors, absolutely and irredeemably," "all right, title, and interest" in every part of the property of the debtor. Another clause, one of the dividend clauses, the 132nd, after express provision for the first and the second dividends, goes on to say that similar divisions are to be made from time to time "until the whole funds of the bankrupt shall be divided." And the very clause which is relied upon, the 152nd, provides for steps to be taken by the trustee

in order to obtain his discharge "after a final division of the funds." From the beginning to the end of the statute there is not a syllable to cut down the right so given to the creditors, in accordance with the general purpose of the Act, to have all the funds which vested in the trustee divided among them.

But it is argued that, because in point of fact, in such a case as this where there has not been a final division of the funds, (the question could never have arisen if there had been such a division), a trustee, upon the erroneous supposition that there were no more funds to be divided, has taken the steps provided for by the 152nd section and has got a discharge, therefore it is impossible to distribute the funds which ought to be distributed for the benefit of the creditors, and that they revert to the bankrupt. I should have said that that was a very difficult proposition seriously to maintain, even if there had been nothing in the Act providing for the circumstances under which something is to revert to the bankrupt. But the 155th section expressly says that "any surplus of the bankrupt's estate and effects that may remain after payment of his debts, with interest, and the charges of recovering and distributing the estate shall be paid to the bankrupt." And there is another section mentioned by one of your Lordships, dealing with a case which has not happened here, which also provides for something which is to go to the bankrupt.

Well, then, what is the question? It is contended that, when, upon the face of all the clauses in the Act which determine and provide for the rights of the parties, it is clear that this fund is not to go to the bankrupt, but is to go to his creditors; yet, because a trustee has been discharged and the case does not fall under the clause which provides for death, resignation, or removal, and the necessity for appointing a new trustee had not been discovered till the existence of this distributable fund was discovered, therefore you cannot now by any means whatever appoint a new trustee, because there is no express provision for it in the statute. I must say for my own part I look upon the appointment of a new trustee for this purpose as nothing more than machinery for giving effect to the rights given by the Act.

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It seems to me that the Court has under the Act the power of providing that machinery for giving effect to those rights; and the practice of the Court of Session has been in accordance with that view of the case.

I think it would be very difficult to imagine a clearer case than this is; and, with regard to the special circumstances, the facts which were stated, as operating by way of an equitable estoppel in some way or another to prevent the assertion of the right of the creditors, seem to me not to raise any intelligible shadow of any equity whatever. Therefore, I have to move your Lordships that this appeal be dismissed, and, the appellant being a pauper, that it be dismissed in the way usual in pauper cases, without costs.

LORD WATSON:—

My Lords, I am of the same opinion. The provisions of the Bankruptcy Act of 1856, strip the bankrupt of the whole property of every description which is vested in him at the date of the sequestration, and also of all property that may come to him during the subsistence of the sequestration prior to his own discharge. According to my view of the statute, he can only get back the property which has been taken from him absolutely and irredeemably by the force of the statute in one of three ways; either, first by his discharge upon payment of a composition to his creditors; secondly, by receiving a part of it as surplus after satisfying their claims to the extent of twenty shillings in the pound; or, in the third place, by a transaction with the trustee and creditors of the bankrupt's estate. The creditors may deal with him as to the footing upon which they give back part of the property; they may abandon it. It is not necessary, in my view, that in every case there should be a retrocession. The acts of the trustee and creditors in relation to it may be such as to indicate that the bankrupt is, according to their desire, to be deemed to be in future the master or the owner of the property, and that they have abandoned and rejected it.

Now, as to the period when a sequestration comes to an end, the able argument of Mr. Haldane rested mainly upon this: that

the sequestration in this case had absolutely come to a close in terms of the statute, and accordingly that the exercise of their prætorial power by the First Division of the Court of Session was in reality legislation; that they had revived a process which by the statute was at an end. My Lords, I am quite unable to take that view of the provisions of the Act. I think the final close of the sequestration contemplated by the statute was the discharge of the trustee after the final distribution—after the whole of the funds vested in him by force of the statute had been applied to their proper purpose, namely, payment of the debts ranked in the sequestration. When I speak of final distribution, I mean distribution of what were in fact the last funds available for the purpose.

Now in this case there was no doubt a discharge of the trustee upon the footing that the available funds had been distributed. That was the footing upon which the discharge of the trustee proceeded, so far as I can see. But it proves to have been in face of the fact that there were funds extant at that date which were available, and might have been made available by the trustee for division among the creditors. Now it appears to me that the discharge of a trustee upon that footing before final distribution, either in ignorance or by inadvertence, cannot possibly alter the provisions of the Act, and that by force of the Act the sequestration notwithstanding subsists for behoof of the creditors. When a trustee has been discharged upon that footing erroneously, I do not doubt (indeed, I think it is implied in the statute, as my noble and learned friend on the Woolsack has said) that the Court has power to furnish the machinery necessary for working the sequestration to its close—necessary for getting in the whole assets available for payment of the creditors and distributing those assets among them, and I have only to add, that in my opinion the parties who made this application to the Court below were quite right in appealing to the nobile officium of the Inner House, because I do not find in the statute any precise delegation of the authority required for such a purpose either to the Lord Ordinary on the Bills, or to the Sheriff.

Upon the second part of the case I have nothing to add.

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LORD BRAMWELL:—

I am entirely of the same opinion, and I cannot advantageously add anything to what has been said.

LORD MORRIS concurred.

Interlocutors appealed from affirmed, and the appeal dismissed.

Lords' Journals 16th June 1891.

Agents for the appellant: *Savidge & Southern, for Andrew Urquhart, S.S.C., Edinburgh.*

Agent for the respondents: *Andrew Beveridge, for Alex Morison, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1891 *June* 25.

A. B. . . . . APPELLANT;

AND

C. D. . . . . RESPONDENT.

Practice—Insanity—Curator bonis—Insane Delusions—Opposition of Alleged Incapax—Discretion in the Court to refuse Inquiry before a Jury—Act Sederunt, 1730—20 & 21 *Vict. c.* 71—31 & 32 *Vict. c.* 100, *s.* 101.

The wife of a man who was detained in a lunatic asylum presented a petition for the appointment of a curator bonis to her husband. He opposed the petition, maintaining that he ought not to be superseded in the management of his affairs until a cognition had issued in order to have the finding of a jury on the case. He did not dispute the propriety of his being in an asylum, but stated that such delusions as he might labour under in no way interfered with his business capacity.

The Court of Session, on a consideration of the medical reports obtained by the petitioner, by the alleged lunatic, and by the Lord Ordinary, granted the petition and appointed a curator bonis. On appeal by the alleged lunatic:—

Held, affirming the decision of the Court of Session (18 Court Sess. Cas. 4 Series (Rettie) 90) that the case was governed by *Bryce* v. *Graham* in this House (2 & 3 Wil. & Shaw, 481 and 323 respectively); and that the Court of Session was fully warranted, by its practice extending over a very long period, to act in its discretion as it had done.

APPEAL from a decision of the First Division of the Court of Session, Scotland (1).

(1) 18 Court Sess. Cas. 4th Series (Rettie), 90.

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The question being one merely of the practice, now long continued, of the Court of Session appointing a curator bonis, or official manager, of an alleged lunatic's property on medical reports alone, without a judicial inquiry or trial by a jury, the facts of the case are sufficiently set forth in the head-note and in the judgments.

June 22, 25. *Rigby*, Q.C., and *J. Guthrie Smith* (of the Scotch Bar), (with them *Haldane*, Q.C., and *Birrell*), appeared for the appellant—the alleged lunatic—and contended that he was entitled to judicial inquiry or a trial before a jury.

[They commented on the Scotch Acts of Sederunt of the 13th of February, 1730, and of the 3rd of December, 1868, s. 2: 20 & 21 Vict. c. 71; 31 & 32 Vict. c. 100, s. 101. *Bryce* v. *Graham* (1); *Dewar* v. *Dewar* (2); *Gordon* v. *Gunn* (3); *Forsyth's Case* (4); *Lockhart* v. *Ross* (5); *Macfarlane's Case* (6); Bell's Principles, sect. 2121; Fraser's Parent and Child, p. 544, quoting *Jerdon* v. *Scott*, the 2nd of March, 1784.]

Sir *Horace Davey*, Q.C., and *A. Graham Murray* (of the Scotch Bar), appeared for the respondent, but were not called upon.

Lord Herschell:—

My Lords, this is an appeal from a judgment of the Court of Session affirming an appointment made by the Lord Ordinary of a curator bonis in the case of the appellant, who at that time was under detention in an asylum, as a person of unsound mind. He was so detained in conformity with the law, by reason of the certificates given by two medical men, with reference to his mental condition. He being thus under confinement as a person of unsound mind, an application was made by his wife for the appointment by the Court of a curator bonis. The appellant opposed any such appointment being made, and those who were

(1) 2 Wil. & Shaw, 481; 3 Wil. & Shaw, 323.
(2) 12 Court Sess. Cas. 1st Series (Shaw), 315.
(3) 11 Court Sess. Cas. 1st Series (Shaw), 235.
(4) 24 Court Sess. Cas. 2nd Series (Dunlop), 1435, at p. 1438.
(5) 19 Court Sess. Cas. 2nd Series (Dunlop), 1075.
(6) 9 Court Sess. Cas. 2nd Series (Dunlop), 306.

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acting for him, after putting before the Court the certificates which had been given by various medical men to whom I will refer in a moment, "submitted his case to the consideration of the Court," and prayed that "after making such further inquiry as shall appear to the Court to be necessary or desirable in the circumstances, the Court, in the event of considering it necessary that a curator bonis should be appointed to the appellant, may be pleased to appoint such person as the Court in its wisdom may select," but objection was taken to the appointment of the person whose name had been suggested by the petitioner.

Now, it appears that on the 20th of May of last year, the appellant, having been confined in the lunatic asylum in the month of April, was examined by two medical men, Dr. Stewart and Dr. Watson, and that they gave this certificate: "While we should not recommend it as safe that —— (the appellant) should be relieved from a restraint which has acted most beneficially in favouring recovery, and is, we believe, fitted to secure the best prospect of ultimate restoration to health, we feel it impossible at the present moment, from facts observed by ourselves, to grant a certificate for the appointment of a curator bonis. What we do recommend is delay; and we beg to advise that, after the lapse of a month or six weeks, a further examination of —— (the appellant) should be held for the purpose of deciding upon the necessity of appointing a curatory."

A few days after that, a little more than a week, the appellant was examined by two other medical men—Dr. Balfour and Dr. Littlejohn; the one on the 28th of May, and the other on the 31st. On the 28th of May Dr. Balfour certified that he had "seen and examined" —— (the appellant), and was "of opinion that he is of unsound mind, and incapable of managing his own affairs, or of directing their management." And on the 31st of May a similar certificate was given by Dr. Littlejohn.

If the matter had rested only on those certificates it might have been open to some possible question regarded from a medical point of view, whether the appellant was incapable of managing his affairs, by reason of the terms of the certificates given in the first instance by Dr. Stewart and Dr. Watson. But naturally enough those who were acting for the appellant as his law

agents, secured the services of two medical gentlemen in whom the appellant had confidence (I rather think one of them was named by himself), namely, Dr. Clouston, and Dr. Byrom Bramwell. They, on behalf of the appellant, made an examination of his condition with a view to expressing their opinion as to whether he was or was not capable of managing his affairs, and they came to the conclusion which is thus expressed: "We found him coherent and acute in regard to business matters. His memory seemed to be good with regard to everything except the events of the morning of the 3rd of April last; but, taking into account the whole of the facts elicited at our prolonged examination of his mental condition, we feel unable to give a certificate that he is yet fit to manage his affairs or to give directions for their management."

Now, it appears to me that anything more calculated to produce in the mind of any one the conviction that this gentleman was incapable of managing his affairs it is impossible to conceive. That two medical men visiting him at the instance of his law agents, and at his own instance, with the view of, if possible (for of course they would understand that to be the object of their visit), certifying that he was capable of managing his own affairs, should feel themselves unable to give such a certificate shews that the conclusion arrived at by those who had examined him on behalf of the petitioner was not a conclusion which resulted merely from bias or prejudice in their minds or from any want of skill; but was a conclusion which those selected by himself or his advisers felt themselves unable to controvert.

The matter does not rest there, because the appellant was also examined by three other medical men at his own instance or the instance of his advisers. Dr. Howden and Dr. Ferguson saw him in the month of November, 1890. I need not trouble your Lordships with the particulars of the statement which they make, which is of considerable length, but in that statement they detail a conversation which they had with him, which indicated that he was under the belief that for many years those about him had been attempting to poison him with arsenic, "He stated that he had frequently seen a suspicious white powder in the doses of Epsom salts he was in the habit of

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taking; that he tasted arsenic in his tea; that he had overheard some remarks about the drug in his house; and that he believed some one was procuring it from a firm who advertised 'neuralgic pills.' As proof of the last supposition, he had found the cover of a journal in which the pills in question were advertised. Inside the cover there were two pieces of red silk. When asked to explain what connection the silk had with the arsenic" (a very natural question of course for one medical man to put to another), "he said he believed that the pieces of silk had contained arsenic, and that he regarded them as important links in the chain of suspicion. When asked to name the person whom he suspected of obtaining the poison, he declined to do so." The conclusion which these gentlemen state is that he was "of unsound mind," "that if at large" he "might be dangerous to the persons who are the object of his suspicions, and that the nature of his delusions unfits him to treat with fairness the members of his own family and household, and renders him liable to be biased in a similar manner against others; (third) That, nevertheless, he is capable of clearly appreciating his worldly interests in many ways; (fourth) That, if management of his affairs includes a just and natural regard to the interests of his family, we do not consider he is worthy of being intrusted with their management; but (fifth) That we are not prepared to say that his mental condition, as ascertained by us, incapacitates him from administering his affairs in other respects," which obviously means that he is in their opinion suffering from insane delusions which might affect the disposal by him of his property and might lead him to employ it in a manner in which he would not employ it if he were sane; that is to say, he might dissipate it upon objects on which, if he were sane, he would not desire to spend it.

On the 7th of November, 1890, he was examined by Dr. Yellowlees, who had an interview with him lasting over two and a half hours, and he says: "I believe that —— (the appellant) is conversant with his business affairs and investments, and that he could give directions concerning them, but such directions would be influenced, or swayed, or determined by the presence of delusions as to relatives or others conspiring against him and desiring to

injure him, and might be influenced by insane ideas as to spiritualism and its devotees, supposing —— (the appellant) to entertain such delusions and ideas."

Now, those were the opinions which were before the Court. It appears to me that if the Lord Ordinary was justified in being guided by the expression of medical opinion, it is difficult to conceive a stronger case justifying the conclusion that it was not proper to leave the appellant in the management of his own affairs, but to appoint during the period for which his insanity should continue a curator bonis. When the matter came before the Lord Ordinary, notwithstanding these medical opinions, he determined not to act upon them alone. The later opinions which I have read were, I think, given after the date of the Lord Ordinary's judgment—they were before the Inner House, but not before the Lord Ordinary. But the Lord Ordinary not being satisfied to act upon the medical opinions which were before him, remitted the case to Sir Arthur Mitchell, who I believe (it is so stated by Lord Maclaren) fills the office of Chief Commissioner in Lunacy, to report to him upon the subject. About the competency and the high character of Sir Arthur Mitchell there cannot be a question. Sir Arthur Mitchell accordingly reported to the Lord Ordinary that in his opinion the present appellant was "of unsound mind," and that in consequence of this "he was incapable of managing or of giving directions for the management of his affairs." Sir Arthur Mitchell states that he "arrived at this opinion without hesitation or difficulty." I understand that to mean that in his opinion his unsoundness of mind was of such a character that he was incapable of managing or giving directions for the management of his affairs. The Lord Ordinary was not left merely to a consideration of the terms of that written opinion, because he had a personal interview with Sir Arthur Mitchell, and learned from Sir Arthur Mitchell that in his opinion the appellant was "subject to delusions related to what is known as spiritualism, of such a nature as to render him quite an unsafe guardian of his own property, and which might render him liable to be very readily imposed on by designing people who were aware of his weakness." The Lord Ordinary adds: "He entertains besides, Sir Arthur

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informs me, feelings of mistrust towards his family which cannot be altogether disregarded."

Now, that was the information which the Court possessed. If it was open to the Lord Ordinary and the Inner House to exercise their discretion, relying upon the information afforded by these medical opinions and the report of Sir Arthur Mitchell on the remit to him, I do not think it can be doubted for a moment that the conclusion at which they arrived in their discretion cannot possibly be questioned—no ground for questioning it has been made out. There was really no conflict of opinion in this case between the medical men who were consulted. Those consulted on behalf of the appellant were manifestly as fully persuaded as those consulted by the petitioner that it was a case in which it was not expedient that he should be left to manage his affairs.

But then it was argued on behalf of the appellant, first of all that there was an absolute right in such a case as this, where the appointment of a curator was opposed, to have a cognition and an investigation by a jury, and that only after a finding by a jury could he be deprived of the management of his affairs. I think it is impossible so to maintain after the judgment of this House in the case of *Bryce* v. *Graham* (1) in 1828. That was a case where a curator of an admittedly insane person had been appointed, and it was alleged that he was at that time convalescent, and sought on that ground to get rid of the curator. The Court there remitted to the sheriff depute to make certain inquiries. I shall have occasion to deal with the terms of that remit presently, it is unnecessary to go into them for the moment; but notwithstanding that inquiry by the sheriff it had been contended before your Lordships' House that there was an absolute right to a cognition and to the verdict of a jury upon the question then at issue. Lord Eldon, influenced by the English practice, appears at first to have been disposed to entertain that view; but, after learning what had been the practice of the Court of Session, he thus expressed himself: "When this cause was heard it was thought necessary by this House to desire the Court of Session to consider whether they could take this course according to

(1) 3 Wil. & Shaw, 323.

their law or whether there was not a necessity for a cognition to issue in order to have the finding of a jury on the case. My Lords, we have since received the answer to that question so propounded by your Lordships, and that is that the Court have been in the habit of proceeding in this course for a very long period of years—for so long a period that I do not think it is proper to advise your Lordships to hold that this is not a legal proceeding on their part." Now that I take to be an absolutely unequivocal decision of this House, that there is no such right to a cognition as has been contended for here, and that the Court can, without any such cognition, deal with the question of the appointment of a curator bonis in the case of a lunatic.

But then it was contended on behalf of the appellant that even if there be not the absolute right to a cognition contended for yet the Court can only appoint a curator after a judicial inquiry, that is to say after evidence has been taken in the ordinary way upon oath with the opportunity of cross-examination by the opposing party. I do not mean to say that it was contended that this must be done in every case. It was admitted that in many cases a curator was appointed without such an inquiry; but the argument was that in every opposed case, where the alleged lunatic was objecting to the appointment of a curator, the appointment of a curator could only be made after a judicial inquiry. Some reliance was placed by the learned counsel, for the purpose of supporting that argument, upon the course taken in the case of *Bryce* v. *Graham* in the year 1828 (1), to which I have just alluded. It is quite true that in that case the Court remitted to the sheriff depute "to inquire concerning the condition of intellect and state of faculties of the petitioner, James Bryce, and his abilities, to manage and conduct his own affairs;" and they authorized and directed the sheriff "to proceed in the inquiry by personal visitation of, and intercourse with the said James Bryce, at various times, and without previous warning or concert; as also, by examination upon oath of such witnesses suggested by either party who had sufficient cause of knowledge respecting the premises, and likewise by the opinion of medical persons named by the sheriff to visit him"; and they then ordained the sheriff

(1) 3 Wil. & Shaw, 323.

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"to report his opinion on the said matters to the said Lords." But, as I understand, such a remit to the sheriff was a course taken by the Court only for the purpose of informing their own minds and enabling them to decide, after receiving that report, what was in their judgment the proper course to be pursued. It was not a remit to the sheriff to try the case. Whatever conclusion had been arrived at by the sheriff, as I understand, it would have been open to the Court to disregard it, and, notwithstanding the opinion of the sheriff that a curator ought or ought not to be appointed, the Court might have come to the very opposite conclusion. It was only for the purpose of assisting them to form a judgment that the remit was made. Now I do not understand that remit to have been made in a form which can be regarded as a precedent universally to be followed and applicable to every kind of case. In that particular case it was considered by the Court, having regard to the circumstances, to be a proper form of remit, but I do not consider it either to have decided that in every case a remit to the sheriff was necessary, or that if there were such a remit, that was the proper form.

I think the contrary is proved by the authorities. In the case of *Gordon* v. *Gunn* (1), which was also a question as to the appointment of a curator bonis, and where there was a remit to the sheriff, the remit was in these terms: "to inquire concerning the condition of intellect and state of the faculties of Mr. John Gordon of Swiney and his abilities to manage and conduct his own affairs, and with power to examine medical men and witnesses on the subject and to report." Now power is no doubt given to examine witnesses as well as to examine the alleged lunatic himself, and to examine medical men, but no obligation is imposed on the sheriff, nor is any direction given, such as was given in the case of *Bryce* v. *Graham* (2), where he was not only empowered, but was in terms directed to do so. Here all I can find is that power was given to him to examine medical men and other witnesses on the subject.

The case does not stop there, because, in *Dewar* v. *Dewar* (3), which is a later case, the Court made a remit to the sheriff sub-

(1) 11 Court Sess. Cas. 1st Series (Shaw), 235. (2) 3 Wil. & Shaw, 323.
(3) 12 Court Sess. Cas. 1st Series (Shaw), 315.

stitute "to inquire as to the facts and circumstances alleged by the parties, and report whether in his opinion it was necessary or expedient for the protection of the respondent to appoint a judicial factor or factors or curator or curators bonis." "The sheriff substitute, having personally visited the respondent and made due inquiry otherwise, returned the following report." I need not trouble your Lordships with the terms of that report. It is manifest that in that case the appointment neither directed him to examine witnesses nor did he take proof as upon a judicial inquiry, but he made his report to the Court, and then the Court were in a position to act after receiving the information which he supplied to them. Now that case seems to me to be a distinct authority against the proposition contended for by the learned counsel for the appellant, because it is obvious that if in every case where there is opposition there is the right to a judicial inquiry either by the Court itself or by a remit to the sheriff, the Court neglected its duty in that case by not making the judicial inquiry which it is contended must in all cases be made.

Therefore, I confess it appears to me, that so far as authority goes, there is no authority for the proposition, that in every case the Court is bound to make a judicial inquiry, or to remit the case to the sheriff in order that he may do so; and it seems to me that there is authority for the course being taken which was taken in the present case, for, in *Forsyth* v. *Forsyth* (1), the Court made a remit to two men of skill in order to have the advantage of their opinion upon the subject. In the present case a remit was made by the Lord Ordinary to Sir Arthur Mitchell, a man, as I have said, highly competent to fulfil such a function; and the Court had the advantage of his report before arriving at any conclusion. Therefore, my Lords, there appears to me to be no authority justifying the assertion that the Court can only act by taking proof itself, or having proof taken before the sheriff. There is authority for the proposition that the Court may act, and has been in the habit of acting, upon a remit to a medical man or medical men of skill to assist it in forming its conclusion. But all these authorities together leave, without

(1) 24 Court Sess. Cas. 2nd Series (Dunlop), 1435.

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any doubt, the impression upon my mind that in every one of these cases it is for the Court to form its own conclusion, and it is for the Court to determine, in its discretion, what assistance it will obtain towards forming that conclusion. That assistance has been of a different character in different cases, but whatever its character has been, whether in the way of proof before the sheriff or not, it appears to me only to have been such assistance as the Court thought right to acquire, in order to enable it to come to a conclusion as to how the discretion reposed in it ought to be exercised.

If that be so, I think it disposes of the whole of the contentions which have been put before your Lordships on behalf of the appellant; and it shows the course taken in this case to have been correct. I therefore move your Lordships to affirm this judgment, and to dismiss the appeal.

Lord Watson :—

My Lords, I have nothing to add to the statement of this case which has been made by my noble and learned friend. To anyone conversant with the law and practice of Scotland, this must, in my opinion, appear to be a most groundless appeal. I think there can be no doubt in the first place that the Court of Session had jurisdiction to entertain the application made to it; in the second place, that, notwithstanding the appearance of the present appellant to oppose its prayer being granted, it was a matter entirely within the discretion of the Court to determine what inquiry was necessary for the purpose of enlightening them as to the capacity or incapacity of the appellant to manage his own affairs; and in the third place, I think it equally clear that the certificates of the medical men were quite sufficient to justify the Court in taking the course which they did take and making the appointment without further inquiry.

Lord Morris concurred.

Costs.—After judgment dismissing the appeal had been given from the Woolsack, Lord Herschell asked as to costs.

Lord Watson: The curator is not a party here; he is the servant of the Court of Session, and will make what payment they choose to direct out of the funds; but it occurs to me, that unless this House makes some Order, the Court below may have a difficulty in dealing with the House of Lords' costs. Probably it would be better that the House should direct the costs of this Appeal on both sides to be paid, taxed as between party and agent, out of the funds in the hands of the curator.

Ordered and adjudged that the Interlocutors appealed from be affirmed; and that the costs in this case on both sides, as between party and agent, be paid out of the funds in the hands of the curator.

Lords' Journals 25th June 1891.

Agents for appellant: *Keeping & Gloag, for Mitchell & Baxter, W.S. Edinburgh.*

Agents for respondent: *Grahames, Currey & Spens, for Tods, Murray & Jamieson, W.S. Edinburgh.*

[PRIVY COUNCIL.]

J. C.* 1891 Nov. 14.

HUNTER AND OTHERS . . . . . PLAINTIFFS;

AND

SS. "HESKETH" . . . . . DEFENDANT.

Practice—Bail—Rules of 1865 *and* 1883.

Held, that Rule No. 15 of 1865 may be dispensed with in a proper case.

THIS was a motion by the appellants that they, having already given bail in the Court below by two sufficient sureties to answer the costs of this appeal in a sum not exceeding £300, be relieved from complying with the respondent's notice to give additional bail under the Rules of 1865 to answer the said costs in the sum of £200.

Pyke, for the appellants.

Carson, for the respondent.

[Reference was made to *Michell* v. *Brown* (1).]

LORD HOBHOUSE:—

Their Lordships entertain no doubt of their power to dispense with the obligation put upon an appellant of giving bail for £200 under rule 15 of the Privy Council Rules of 1865 for appeals in ecclesiastical and maritime causes in a proper case. And it seems to them that when, as in the present case, bail has been already given in the Colony for the sum of £300, in pursuance of the Rules of 1883 for Vice-Admiralty Courts abroad, the respondent is practically secure, and that it is a proper case for dispensing with any further security. Their Lordships will therefore make an order to that effect, costs of the application to be costs in the cause.

Solicitor for the appellant: *G. P. Slade.*

Solicitors for the respondent: *Snow, Snow, & Fox.*

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, and SIR RICHARD COUCH.

(1) 1 E. & E. 267.

[HOUSE OF LORDS.]

M'INROY AND OTHERS (TRUSTEES) . . . APPELLANTS; H. L. (Sc.)
1891
July 2.
AND
THE DUKE OF ATHOLE . . . . . RESPONDENT.

Easement—Servitude—Right of Way for purposes of Sport—Scotch Law—Constitution of Right.

In order to found a prescriptive right of way according to Scotch law the acts of possession relied on must be of such a character, or done in such circumstances, as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted and the nature of the right.

A mountain path through a projecting tongue of an adjoining property formed a convenient short cut from one part of an estate to another. The evidence in support of a right of way over this path for the benefit of the estate shewed a use of the path from 1841 to 1887 by the proprietors of the estate—the appellants' predecessors—as a means of going from one part of the estate to the other when deer stalking in autumn, or for driving back stray sheep; but it was used by them for no other purpose. This use of the path was on only two occasions, in 1857 and 1882, challenged by the proprietor of the adjoining property. In 1888 he brought an action for interdict against the future use of the path by the appellants. The appellants limited their claim to a right of way for purposes connected with sport:—

Held, that the appellants had failed to prove such an open and unequivocal assertion of the right of way as the law required.

APPEAL from a judgment of the Second Division of the Court of Session, reversing the decision of the Lord Ordinary (Kinnear) (1).

The facts and evidence are sufficiently given in the opinion of Lord Watson.

On appeal,

June 11, 12. *Asher*, Q.C., and *Ure* (both of the Scotch bar), appeared for the appellants.

(1) 17 Court Sess. Cas. 4th Series (Rettie) 456.

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[Cases cited *Macpherson* v. *Scottish right of Way and Recreation Society* (1); *Mann* v. *Brodie* (2); *Purdie* v. *Steil* (3).]

The Dean of Faculty (*J. B. Balfour*, Q.C.) and *A. Graham Murray* (of the Scotch Bar), appeared for the respondent, but were not called upon.

July 2. LORD WATSON:—

My Lords, the Cromalton Pass is a natural hollow, about 1000 yards in length, between two mountains forming part of the Ben-y-Ghlo Range. It runs nearly due east and west; and the Cromalton Burn which has its source to the north, flows along the bottom of the pass for more than half its length, on the western side, and then enters the estate of Lude, belonging to the appellants. The pass and the land on either side of it are the property of the respondent. Carn Liath, one of the mountains enclosing it, rises on the south to the height of 3193 feet above sea level; but only the upper part, which apparently comprises about one-third of its altitude, belongs to the respondent. The lower two-thirds are included in the estate of Lude, which surrounds Carn Liath on the east, south and west, and comes up to both ends of the pass. The mountain range to the north of the pass is the property of the respondent.

On the north side of the pass there is a track, or path, continuing all the way through it, which forms the subject of the present controversy. Starting from the west, the track runs along the hill face a considerable distance above the Cromalton burn, which it eventually crosses, and is then continued along the hillside until it reaches the lands of Lude on the east. In this action, the appellants asserted their right to use the track, on the ground that it formed part of an old public road leading from Glentilt on the north-west, to Glenfernate and Kirkmichael on the south-east; and alternatively, that they had acquired, by prescriptive use, a praedial servitude of way, for themselves, their tenants, servants, and others occupying the lands of Lude.

The appellants were allowed a proof of both alternatives; but

(1) 13 App. Cas. 744. (2) 10 App. Cas. 378.
(3) Mor. Dict. 14,511.

they appear to have abandoned, at a very early stage, their claim for a public right of way. The user upon which they relied in the Court below as sufficient to constitude a servitude, was by the family of Lude, their game-tenants and gamekeepers, for sporting purposes, and by shepherds on their farms of Monzie and Loch, which are on opposite sides of Carn Liath.

The Lord Ordinary (Kinnear) and all the learned judges of the second division were of opinion that the appellants have failed to shew that there was any user by shepherds as in the assertion of a right. The Lord Ordinary, being of opinion that the track had been used as of right during the prescriptive period for sporting purposes, sustained the alternative claim of the appellants as made by them on record. In the Inner House, his interlocutor was reversed, and the respondent obtained interdict as craved. In the argument addressed to this House on behalf of the appellants, their claim was limited to a servitude of way for purposes connected with sport.

I think it right to say that I entirely concur in the observations which were made by the late Lord Lee upon the interlocutor of the Lord Ordinary. Assuming that the appellants had, in the open assertion of a right, persistently used the track for the purpose of shooting or watching game, I do not think they could thereby acquire the right to free passage for every man, woman and child on the estate of Lude, for any purpose whatever. I cannot conceive how a general servitude of way could arise in a case like the present, where it is clear that the use had by Lude shepherds during the prescriptive period was by permission, and not as of right.

As for the track in dispute the evidence satisfies me that it is not part of a continuous way, made by or for human use; but that it owes its formation to deer and sheep, although it has been occasionally used by men when it suited their convenience. The only witness who suggests the contrary is Mr. Young, who is under the impression that deer "rather avoid paths," but admits that he "cannot speak about deer." There are no fences of any kind in the locality, which is on the outskirts of the great deer forest of Athole, and it appears that, at certain seasons the deer which are bred in the forest descend below the pass in

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search of food. The season for shooting stags commences in the beginning of August, and ends before the middle of October, and during that period some deer are to be found in the vicinity of the pass. But the chief exodus from the forest is during the late autumn and winter months, when stags are out of season, and only the hinds are fit objects for a sportsman's rifle. The respondent has a few sheep upon that part of the forest upon which the sheep from Lude ground are constantly straying and being driven back. These facts sufficiently account for the numerous short tracks at the west end of the pass which were erroneously supposed by Mr. Young to be human footpaths.

The evidence of the appellants with reference to the use of the track for sporting purposes connected with the estate of Lude covers the whole period from the year 1821 until 1887, when the challenge was given which led to the institution of the present action. But from 1821 the proprietor of Lude asserted right to the ownership of the whole of the upper part of Ben Liath down to the centre of the pass, and he shot over that part of the pass which he claimed, until the respondent's right to these subjects was established by a decree of the Court of Session in 1841. During the period preceding 1841 Lude sportsmen were in the occasional habit of using the pass for the purpose of getting from their ground on the east side of Ben Liath to their ground on the west, and vice versâ; but whilst the evidence shews that on some of these occasions they shot over that part of the pass which they then claimed, there is neither probability nor proof that they either used, or claimed the right to use, the track now in dispute.

The case of the appellants must therefore depend upon their evidence of continuous and uninterrupted possession of the right which they now claim during the period of forty-six years following 1841. It is unnecessary to enter into the details of that evidence. It comes to this, that at certain seasons in each year the proprietors of Lude and their friends or game-tenants in the course of their sport on the upper moors of Lude, used to go to their ground on the other side of Carn Liath, which they did by means of the track; and also that their keepers sometimes used the track in going their rounds. It appears to have

been rarely used by sportsmen in pursuit of grouse; but when there were no deer on the west face of Carn Liath stalkers found the track to be a convenient means of getting to the east face instead of going round the south end side of the hill. The Lude ground is not, in the strict sense of the term, a forest, and deer stalking upon it was chiefly confined to the hinds which descend from the higher grounds and frequent the sides of Carn Liath during the winter months. Even at that season the use of the track was not regular, but occasional.

I do not find it necessary to consider, for the purposes of this appeal, the point discussed by some of the learned judges of the Inner House, touching the amount of tolerance which ought to be implied on the part of a proprietor who sees a party of sportsmen taking a short cut across his land in order to reach another part of their ground. That must depend upon the circumstances of each case. If the respondent and his predecessor had been aware of the use made of the track by the Lude sportsmen at certain seasons in each of forty-six consecutive years, I should have had great difficulty in coming to the conclusion that such user was merely tolerated. But it appears to me that the facts of this case absolutely exclude the idea of tolerance. The only inference which I can draw from the proof is, that, had the respondent or his predecessor known of that use, they would immediately have done their best to put a stop to it.

I do not doubt that, in order to found a prescriptive right of servitude according to Scotch law, acts of possession must be overt, in this sense, that they must in themselves be of such a character, or be done in such circumstances, as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted and the nature of the right. The proprietor who seeks to establish the right cannot, in my opinion, avail himself of any acts of possession in alieno solo, unless he is able to shew that they either were known, or ought to have been known, to its owner, or to the persons to whom he entrusted the charge of his property.

In many, indeed, in most cases, where a servitude of way is claimed, the natural and necessary inference arising from its local situation is, that the user must have been known to the

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owner of the solum, or to those whose duty it was to give him information. But that is an inference which it would be very unsafe to derive from the mere fact of the occasional user of an isolated deer track, in a region remote from public observation, which is only visited at rare intervals by a few sportsmen, foresters, or shepherds.

With three exceptions upon which great stress was laid in the argument addressed to us by the junior counsel for the appellants, not one of the numerous witnesses examined for them was able to say that a Lude sportsman or a Lude keeper was ever, in the course of these forty-six years, seen upon the track, either by the respondent's servants, by the shepherds on the adjoining lands, or by any other person. The exceptions were these. Angus Cameron, who has been head-keeper at Lude since 1871, says, that in 1872 or 1873, when he was going through the pass with Mr. James M'Inroy, a son of the late proprietor, they met one of the Duke's foresters who did not find fault with them. He does not say at what season, or that they were either grouse shooting or deer stalking; so that taken by itself, the incident is immaterial. The witness Gordon, who was examined on interrogatories in Canada, says that he never met the Duke's foresters in the pass itself, that they were in the neighbourhood when he went through it with his father, then head keeper at Lude. But it is obvious that his statement refers to the period antecedent to 1841, because he states his understanding to have been "that the property on both sides of it (i.e. the pass), belonged to Mr. M'Inroy." The third exception is the witness William Carrick, who was an under-keeper at Lude for three years, between 1868 and 1871. He certainly does state in his examination-in-chief, that when going through the pass he met the respondent's foresters on several occasions. But on cross-examination he explains that "the only time that I met any of the keepers right in the pass, was when I was with them shooting foxes."

The appellants' own evidence points strongly to the inference that their use of the track was made in such circumstances that it was not likely to come, and in point of fact never came, to the knowledge of the respondent or his predecessors. But the

matter does not rest there. A large and concurrent amount of testimony has been adduced by the respondent, which shews that the appellants' user was unseen by, and unknown to, the proprietors of the Athole forest and their shepherds and foresters; and that testimony is not confined to servants upon the Athole estate. Amongst others, David Guild, who was the appellants' tenant in Monzie from 1867, that is, for twenty years before this dispute arose, never heard of his landlord, or anybody else, using the Cromalton Pass in order to get from his farm to the east side of Carn Liath.

There are two incidents established by the proof which appear to me to have a significant bearing upon this part of the case.

The first of these occurred between 1852 and 1857, and is spoken to by John Stewart, at that time a forester in the employment of the late Duke of Athole. The Duke was in the pass with his retainers, when he saw the late Mr. M'Inroy and his keeper, who were also going through the pass westwards, having entered it from the east. The Duke, in the hearing of the witness, who was close beside him, gave orders to his head keeper to go and turn back the intruders. The order was obeyed, and the witness saw Mr. M'Inroy and his keeper return in the direction from which they came. I see no reason to question the accuracy of the statement. The Lord Ordinary, before whom the witness was examined, suggests no doubt as to his credibility, although he makes light of the circumstance, mainly because Mr. M'Inroy continued notwithstanding to assert and use his right. I should agree with the Lord Ordinary's estimate, if I were, as he appears to have been, satisfied that the previous and subsequent user were open to observation, and known to the person who challenged it on that occasion. Persistent use in the face of challenge is a clear assertion of right; but I can find no grounds for supposing that Mr. M'Inroy, either previously or subsequently, used the track or the pass in such a way as to indicate that he was asserting a right. If that be so, and in my opinion it was so, the conduct of Mr. M'Inroy was well calculated to assure His Grace of Athole that he was making no pretension to a right of way through the Cromalton Pass.

The next occasion was in September, 1882, at a time when the

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mansion and shootings of Lude were let to Sir A. B. Walker. The present respondent was shooting in the pass, when he observed traces of a party having passed along the track with a horse. He immediately wrote to Cameron, the appellant's head keeper, stating his belief that the party must have come from Lude, and intimating that the keepers and others from Lude must understand that they were trespassing when they went up the Cromalton. His Grace treated the trespass as one arising from the inadvertence of the keepers, and informed Cameron that if it were repeated he would be obliged to complain to Mr. M'Inroy, who is the leading appellant.

Cameron forwarded the respondent's communication to the appellant, under cover of a letter, asking for directions in which he says with respect to the track, "I was told some time ago that it was an old drove road; if such is the case the Duke cannot prevent us taking it." Mr. M'Inroy's reply has not been preserved, but the tenour of it may be implied from Cameron's answer, which is in these terms: "I am glad we have done nothing wrong. I am perfectly sure the late Mr. M'Inroy would never have allowed me to cross the Cromalton unless he had proper right to it. We have not crossed it since, but will do so some day this week." Whatever may have been the instructions given by Mr. M'Inroy to his keeper, it is certain that he neither answered the respondent's letter himself, nor directed his keeper to do so, and that no answer was sent.

I cannot understand why no answer was sent to the respondent's communication; and the appellant's counsel made no attempt to explain it. Going through the pass next week was no answer, unless there was some one there to see on the respondent's behalf. The terms of the communication implied that the writer was unaware of there having been any previous use of the pass; and unless he came to know of its being used subsequently by the Lude people, the silence of Cameron and his master would naturally be construed as an admission of trespass. I entertain no doubt that it was so construed; and that the respondent was unaware of the continuance of the use for five years afterwards.

In these circumstances I have had no difficulty in coming to the conclusion that there has not been an open and unequivocal

assertion of the right which the appellants claim, such as the law requires in order to the constitution of a servitude of way; and I therefore move that the interlocutor of the Inner House be affirmed, and the appeal dismissed with costs.

Lord Bramwell:—

My Lords, I agree entirely with the opinion of my noble friend, Lord Watson. But, as I believe this to be an honest case, I wish to shew the appellants that I have not come to a conclusion they probably will think wrong without forming an opinion of my own on it.

That there would be a path or track in the pass or depression between the two mountains called Cromalton Pass, is certain. Whoever and whatever had to go from the east of those mountains to the west, or the west to the east, man, deer, or sheep, would naturally take that route which would be the easiest. Accordingly we find the marked track, the use of which has been discussed, and we find it has been used in a variety of ways.

The appellants have claimed a right of public way, a right for sheep from the part of Lude on one side of the pass to the other, and a right to pass to and fro for sporting purposes. All these claims are given up, except the claim of a right for sporting purposes. Of course, there having been claims that could not be maintained would not preclude the appellants from the right to one which they could maintain. But I cannot help thinking that it furnishes an argument against them that there should have been uses of the way which were trespasses or permissive.

According to English law, the owner of strayed sheep, though liable for their trespass, would have a right to get them back, at all events after request to the owner of the land where they were, to restore them. The user in support of the right now alone claimed must be examined.

Now, there is no doubt evidence of a user of this path by the occupiers of Lude for the purpose of getting from one side of the pass to the other for sporting purposes on the Lude property;

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and if that user had been frequent enough to the knowledge of the respondent and his predecessors, and persisted in after objection by them, the right might have been established. But in my opinion the user proved is insufficient. In the first place, up to 1841, the Lude proprietors claimed a right to the property in Carn Liath, and could go over it, or the lower part of it, from one side to the other without using the path. It is true they did not claim the soil of the path or track, and it may have been easier to go along it than over a place where there was no track. But it certainly is unlikely that they had a right of way over the Duke's ground close alongside what they thought their own property. Admiral M'Inroy speaks doubtfully as to what route he took. There is, then, the user since 1841, which I repeat, if sufficient, and shewn to be known to the respondent and his predecessors, might establish the right. But there are only two cases where that knowledge is shown—that in 1857, when the then Duke turned back the then Mr. M'Inroy, who submitted, and thereby recognised that he had no right to be on the track; the other is the Duke's letter to the keeper in 1882, communicated to the appellants, and the statements in it not contested. I think these two matters decisive. As to the Athole foresters not informing the Duke and not objecting to the use of the path, there are not many occasions on which they are shewn to have been aware of its use. I think it quite possible that they may not have known the rights of the case, and if they did, may not have wished to be tale-bearers against persons with whom they had probably some friendship or acquaintanceship, and who, perhaps, were trespassing when it was not an objectionable time of year. Lastly, there is this, that the place in question was remote, little used, and difficult to protect. Believing though I do in the good faith of the appellants and their witnesses, I am satisfied they have not made out their case.

Earl of Selborne:—

My Lords, I had partly prepared my opinion in this case when I saw in print that which has just been delivered by my noble and learned friend, Lord Watson. I found the view which he

had taken to agree so entirely with that which I had myself formed, and the manner in which the reasons for that view were stated so satisfactorily to my mind, that I thought I should be unnecessarily occupying the time of your Lordships if I did more than express my entire agreement.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 2nd July 1891.

Agents for appellants: *Faithfull & Owen for Davidson & Syme, W.S., Edinburgh.*

Agents for respondent: *Grahames, Currey & Spens for Tods, Murray & Jamieson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

RALPH DALYELL WELCH (Executor) . Appellant;

AND

MRS. HAMILTON DUNBAR TENNENT . Respondent.

*Husband and Wife—Scotch Domicil—Sale of English Heritage belonging to Wife—Surrogatum—Donation inter virum et uxorem—*3 & 4 *Will.* 4, c. 74, *ss.* 77, 78, 80, 84.

The wife of a domiciled Scotsman, with her husband's concurrence, sold estates situate in England, which belonged to her at the time of her marriage. She acknowledged the conveyance in the manner prescribed by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), declaring at the same time that she intended to give up her interest in the estates without having any provision made for her in lieu thereof. Her husband received the price. There was no marriage contract. The husband and wife afterwards separated by mutual consent. Subsequently the wife executed a deed of revocation of all donations and provisions made by her in her husband's favour. She then brought an action for a declaration that the price of the estates in his hands was either a surrogatum for her heritage, and not subject to the jus mariti, or was a donation to him which she had validly revoked:—

Held, reversing the decision of the Court of Session (16 Court Sess. Cas. 4th Series (Rettie) 876), that having regard to the English law of real property, the price was not a surrogatum for heritage belonging solely

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to the wife, for both spouses possessed undetermined interests in it, and her assent to his receiving the entire price could not be regarded as a donation inter virum et uxorem.

APPEAL from the First Division of the Court of Session, Scotland, adhering to the judgment of the Lord Ordinary (the late Lord Fraser) (1).

The action was originally raised in Scotland by Mrs. Hamilton Dunbar Tennent, the respondent, against her late husband, a domiciled Scotchman, and continued against Ralph Dalyell Welch, the appellant, her husband's executor and general disponee.

Prior to the respondent's marriage, in 1877, at which there was no marriage contract, she was seized in fee simple of Overton, in Shropshire. After her marriage, Overton was conveyed by the husband and wife to Lord Boyne's trustees for a total of about £23,500; and the object of the action was to have it declared that £18,000, paid to the husband, and £5500, retained on trust by the purchasers to keep down an annuity (still in existence) charged upon the estate, were held as surrogata for her heritable estate, free from the jus mariti of her husband: or were donations to him, which she had according to Scotch law validly recalled. She also claimed repayment of £950 paid to her husband as the price of her leaseholds situated in England, but this part of the claim had been abandoned.

The question, what were the rights of the parties in the above sums according to the law of England, was sent up from Scotland under the Law Ascertainment Act (22 & 23 Vict. c. 63) to the Chancery Division.

The case was heard by Kay, J., who held: first, that there had not been a completed sale before the marriage, a point then, but not now, insisted on by the appellant; secondly, that, according to English law, the husband had become absolutely entitled to the two sums of £18,000 and £5500.

The facts and conveyance are set out in the report of that judgment (2), and for the purposes of this report sufficiently appear in Lord Herschell's opinion. To the report in the Chancery Division it need only be added that in the conveyance, the husband covenanted to indemnify the purchasers from any

(1) 16 Court Sess. Cas. 4th Series (Rettie), 876. (2) 37 Ch. D. 622.

loss that might be incurred by reason of the £5500 not producing the full annuity charged upon the estate.

On the 20th of October, 1888, the Lord Ordinary, having the decision of Kay, J., before him, found that the domicil of the husband and respondent was Scotch, and that being so their rights as to the price of Overton must be determined by the law of Scotland. The appellant having declined to prove that the £18,000 had been spent on the matrimonial establishment, his Lordship by Interlocutor, dated the 10th of November, 1888, pronounced judgment against the appellant for the sum of £18,000, and decided that the £5500 was the property of the respondent when the annuity ceased to be payable.

His Lordship said: "Kay, J., has held that the Overton estate was converted into personalty. Then comes the question what law shall determine the rights to such personal estate? The late Charles Welch Tennent and the pursuer of this action were domiciled in Scotland, and the contention on the part of the pursuer is, that her rights must be determined according to Scotch law. If the English property had remained unconverted, then the interests of the husband and wife in it would have been determined by the law of the situs; but as soon as it is changed into personalty, the law of the domicil steps in and declares the rights of the spouses in it. Kay, J., in his opinion assumes this doctrine as correct. 'Supposing the parties to have been domiciled in England, it would follow from the mere fact of such conversion that the husband, by his marital rights, would become entitled at once to whatever interest the wife might have in such personal property.' But if the domicil of the husband and wife were not English but Scottish, then the opinion of the learned judge evidently is that resort must be had to the Scotch law to ascertain the rights of the parties. There can be no doubt that the operation of the jus mariti is regulated by the law of the domicil."

On the 21st of June, 1889, the First Division, adhering to the Lord Ordinary's interlocutor, with a slight variation, held, that the question whether the price of the estate, on its sale after marriage, belonged to the husband or wife, was to be determined by the law of Scotland, it being the law of the domicil, and as

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by that law, where a wife sells her heritable estate, the price received is regarded as a surrogatum of the heritable estate, and does not fall within the jus mariti of the husband, but remains the property of the wife, therefore the price of Overton remained the property of the respondent; and further, that though she had given it to her husband during the marriage, the gift was recoverable by her at any time, and had been revoked (1).

On appeal,

June 19, 22. *Rigby*, Q.C., and *C. B. M'Laren*, for the appellant:—

The Scotch law, the law of the domicil, has no application to these funds. The Court of Session gave judgment upon a misapprehension of the ruling of Kay, J. The foundation of the objection to the husband's right in Scotch law is the presumption that the wife intends to reinvest the price in land, and therefore it is said to be a surrogatum in place of real estate, and is accordingly presumed not to lose its heritable quality. But though the domicil is Scotch, the right between the parties in relation to real estate and its price must be determined by the law of the situs, and that law, the English law, gives these funds to the husband absolutely. Before the respondent can call to her aid the law of her domicil, she must shew that the price of Overton was her separate estate, but this it never was. The fund is not the wife's, but the proceeds of the sale in England of heritable property in England in which husband and wife had each an interest. The husband does not claim through the wife, but in his own right according to the common law of England. One of the incidents of the wife's estate, situated in England is, that if she sells it as this was sold, the price ipso facto belongs to the husband, not because it falls under the jus mariti, but rather because it never became the property of the wife, but belonged to the husband as a purchaser for valuable consideration, his wife being by the English law of real property precluded from setting up any claim thereto. The English rule is that if the wife declines a provision under 3 & 4 Wm. 4,

(1) 16 Court Sess. Cas. 4th Series (Rettie), 876.

c. 74, her interest vanishes with the estate. Nor could she file a bill for her equity to a settlement out of the price (1), which is enough to shew that she had no interest remaining in the price.

Then as to donation. It cannot be denied that the husband had an estate in the property of Overton, and he was one of the vendors, therefore his receiving the whole price cannot be said to be a donation. The truth is that the price received represents as much the husband's property as the wife's; for there could be no sale without the husband's concurrence, and if he gave his consent on the terms of the whole price being his, that was the bargain, and her assent to the sale without a provision being made for her cannot be regarded as a donation. Further, the husband in this conveyance not only conveyed his rights, but entered into covenants binding him to indemnify the purchasers in certain circumstances. [They cited Fraser's Husband and Wife, p. 961—Powers of Donee.]

The Lord Advocate (*J. P. B. Robertson*, Q.C.), and *R. U. Strachan* (of the Scotch Bar), (with them, *Beaufoi Moore*), for the respondent:—

The respondent under the law of her domicil has a right to these two sums, which she can identify as proceeds of her heritable estate. She had a certain heritable right in England, which she sold, and the money came into the hands of her husband. Scotch law, being the law of the domicil, determines the right to that money. Under that law the proceeds of the wife's heritable property do not come under the jus mariti. The Fines and Recoveries Act (3 & 4 Wm. 4, c. 74) is directed to giving a valid title to land belonging to a married woman with rules to test her consent, but there is nothing in it as to what is to be done with the money when paid over, or to preclude the right to it being determined by the law of the domicil. It is said the wife in English law cannot sell without her husband's consent, but in the case of Scotch heritable estate the wife cannot move without her husband's sanction, and there, also, it might

(1) See *May* v. *Roper* (1831), 4 Sim. 360; *Forbes* v. *Adams* (1839), 9 Sim. 462.

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be argued that the law of surrogatum could not apply, but all this has been taken into account in the law of Scotland, and in every case where the wife's estate has been sold, the proceeds have been held to be her property. As long as the estate is heritage, the law of the place governs, but as soon as the estate is converted into personalty it is divested of any special incidents attached to it by the law of the country where it is situated and in which the sale took place, and the law of the domicil decides the rights of the spouses: *Hall's Trustees* v. *Hall* (1). Secondly, the amount in dispute being the proceeds of the wife's estate, which by the law of Scotland belonged to her, the gift of it to her husband was a donation she could recall, and has recalled.

Rigby, Q.C., in reply.

Judgment after consideration.

July 28. LORD HERSCHELL:—

My lords, this is an appeal from interlocutors pronounced in an action raised by the respondent against her late husband, who was the original defender in the action, and is now represented by the appellant as his executor and general disponee. The action was brought to obtain a declaration that the defender was in possession of and held a sum of £18,000, and a sum of £950 as surrogata for the heritable estate of the pursuer, free from the jus mariti of the defender, or otherwise that these sums constituted a donation from the pursuer to the defender, which had been validly recalled by the pursuer. A similar declaration was claimed as regards a sum of £5,500, subject to the burden of the life-rent annuity which it was invested to meet.

The parties were married in the year 1877 without any marriage contract, and the domicil of the husband being Scotch, it was not disputed that this was the matrimonial domicil, and that all questions as to the right to moveables accruing to either of the spouses fall to be determined according to the law of Scotland. The respondent was, at the time of her marriage, the owner of a freehold estate in England called Overton. She was

(1) 16 Court Sess. Cas. 2nd Series (Dunlop), 1057.

also possessed of a leasehold house situate there. These freehold and leasehold properties were both sold shortly after the marriage. The £950 as to which the declaration I have mentioned was claimed, was the purchase-money of the leasehold house, and as the claim in respect of it was abandoned, it need not be further referred to. The £18,000 was part of the price of the freehold estate, which was received by the husband on the execution of the conveyance in July, 1877. The balance of the purchase-money, £5500, was invested as security for the payment of an annuity of £200 a year which was charged on the estate. It is not questioned that the £18,000 was received by the husband with the full assent of his wife, but the circumstances under which it was received, and the precise nature of the transaction will be hereafter considered. Mrs. Tennent on the 28th of December, 1882, revoked all donations in favour of her husband, and this action was afterwards commenced.

There can be no doubt, as I have said, that the rights of the spouses as regards moveable property must, in the circumstances of this case be regulated by the law of Scotland, but it is equally clear that their rights in relation to heritable estate are governed by the law of the place where it was situate.

This is not denied by the respondent, but it is said that as soon as the heritable estate in England became by sale converted into moveables, the Scotch law became applicable. The case of the pursuer was put in this way. It was admitted that all moveables accruing to the wife during coverture become, according to the law of Scotland, the husband's by virtue of the jus mariti, but it was said that there is an exception to this in the case of the proceeds of the heritable estate of the wife, that they do not pass to the husband but remain the property of the wife, and that if she permit her husband to receive and spend them, this is in the nature of a donation which may be at any time recalled by her. It follows, it was argued, that as soon as the estate in England was sold, the proceeds, though they would, according to the law of England, be the husband's, became subject to the law of Scotland, and so did not pass to him.

It is, I think, established that moveables which represent the heritable estate of the wife are not by the law of Scotland

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subject to the jus mariti, and where the matrimonial rights are governed by that law I think this would be the case even though the heritable estate of the wife were situate out of Scotland. But it is manifest that the lex loci rei sitæ must determine whether the estate be heritable estate of the wife's during coverture, and what is the nature and extent of her right in respect thereof. It becomes necessary, therefore, to inquire what was the effect of the marriage according to the law of England upon the heritable estate of which the wife was then possessed. The husband became immediately possessed of an estate therein during their joint lives, and, if there was issue of the marriage, for the term of his own life though he survived his wife. The wife could not, during her husband's lifetime, convey her interest in the property to any other person except with the concurrence of the husband, and by a deed acknowledged in the manner prescribed by the 3 & 4 Will. 4, c. 74, she could not during coverture dispose of it by will, and if she predeceased her husband, and there were issue of the marriage, the estate would, on the death of the husband, descend to such issue. It is therefore, in my opinion, not accurate to treat the purchase-money of the Overton estate as the proceeds of a heritable estate belonging to the wife, and as surrogatum for that estate. It was an estate in which both spouses possessed undetermined interests, the extent of their respective interests depending on whether there was issue of the marriage, and which of them survived the other. It was heritable estate of the husband as well as of the wife, and could not be disposed of to a purchaser without the concurrence of both of them. The purchase-money of the estate in which they were thus interested cannot, in my opinion, truly be regarded as the price of heritable estate of the wife's, which, according to the law of England, becomes the husband's only by the jus mariti, and which, if the law of Scotland be applicable, must be regarded, if the wife permits her husband to retain it, as a donation by her to him.

The right of the husband to the proceeds does not flow only from the jus mariti; it cannot be dissociated from the real property law of this country, which gave the husband the estate and interest which I have described in the heritable property

possessed by his wife at the time of the marriage. The price received from the purchaser represents as much the husband's estate and interest as the wife's. The wife, it is true, was by the sale deprived of the interest which she had in the heritable property; but I do not think that her assent to the entire price being received by her husband without that provision being made for her which she could have insisted on as the price of her concurrence in the conveyance can be regarded as a donation. There could have been no sale without the concurrence of the husband, and if he gives that concurrence on the terms that the whole purchase-money of the estate in which they both have an interest shall be received by him, I do not think that this can be regarded as a donation of all the purchase-money, or even of so much of it as might be found on an actuarial calculation to represent her interest, especially where, as in the present instance, the husband has, in order to complete the sale, entered by the deed of conveyance into an onerous covenant by reason of the charge which existed on the property.

But it is perhaps hardly necessary to determine whether the purchase-money could be regarded as a donation by the wife to the husband to the extent to which it represented her interest as ascertained on an actuarial calculation, inasmuch as the claim in this action is not to have it ascertained how much of the purchase-money received in 1877 represented the interest of the wife in the heritable subject and to treat so much of the purchase-money as should be found to represent that interest as a donation inter virum et uxorem, but to treat the entire price of the estate as surrogatum for the heritable estate of the pursuer. For the reasons I have given, I think it is impossible to do so, even allowing the fullest effect to the Scotch law as regulating the matrimonial rights of the parties.

I think the difference between the view I have indicated, and that of the Court below, has probably arisen from the circumstance that the contention mainly urged upon them on behalf of the appellant appears to have been that the purchase-money, according to the law of England, became the husband's upon the conveyance, and that their attention was not so definitely directed as your Lordships' has been to the fact that, having regard to

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the English law of real property, the price could not properly be regarded as representing the heritable estate of the wife, and as surrogatum therefor.

I am of opinion that the interlocutors appealed from ought to be reversed, and the defendant assoilzied from the conclusions of the summons, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, I concur in the judgment which has been moved, and in the reasons which have been assigned for it by my noble and learned friend.

LORD MORRIS also concurred.

Ordered and adjudged:—*That the interlocutors of the 20th of October and the 10th of November*, 1888, *and also of the 21st of June*, 1889, *appealed from be reversed: further* Ordered, *that the cause be remitted back to the First Division of the Court of Session with directions to assoilzie the defender (appellant) from the conclusions of the summons; and to find him entitled to expenses in the Court of Session: further* Ordered, *that the respondent do pay to the appellant the costs incurred in respect of this appeal.*

Lords' Journals 28th July 1891.

Agent for appellant: *Andrew Beveridge for Carmen, Wedderburn & Watson, W.S., Edinburgh.*

Agent for respondent: *Charles Turner for John Elder, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

THE ATTORNEY-GENERAL . . . . APPELLANT;

AND

JOHN EMERSON, CHARLES SUTTON, AND JOHN WINTRINGHAM. . . . } RESPONDENTS.

H. L. (E.) 1891 May 12.

Fishery, Several, in Tidal Waters—Foreshore of the Sea—Ownership of Soil—Evidence—Presumption—Grant by Crown of Several Fishery.

Primâ facie the Crown is entitled to every part of the foreshore of the sea between high and low water-mark; but proof of the ownership of a several fishery over part of the foreshore raises a presumption against the Crown that the freehold of the soil of that part of the foreshore is in the owner of the several fishery.

APPEAL from a decision of the Court of Appeal, upon an information brought by the Attorney-General against the respondents. The information prayed (inter alia) that the right, title and seisin of Her Majesty the Queen in right of her Crown in her demesne as of fee to and of the foreshore of the sea opposite to the county of Essex, north and east of Havengore Creek, might be declared and established against the defendants, and that the defendants might be declared not to be entitled to the said foreshore, and that they might be restrained from disturbing or attempting to disturb Her Majesty or her officers in the possession of the premises. The respondent Emerson claimed to be owner of the foreshore in question as lord of the manors of Great and Little Wakering. The respondent Wintringham was made a defendant as mortgagee of the manors. The respondent Sutton was made a defendant as claiming an interest in a portion of the manors. The foreshore in question consists of a large tract of sand—known sometimes as the Maplin and sometimes as the Foulness Sands—in the estuary of the Thames, extending from near Shoeburyness in a north-easterly direction towards the river Crouch.

The Queen's Bench Division (Mathew and Cave JJ.) on the 10th of August 1887 made a decree declaring that Her Majesty in right of her Crown had the right, title and seisin as of fee to

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and of the foreshore of the sea in question, save as to the part of the foreshore under lease from one of the defendants' predecessors in title to the Ordnance, and subject to a right in the defendants to a several fishery over part of the foreshore and to wreck of the sea.

The Court of Appeal on the 1st of December 1888, being of opinion that the defendants or one of them had a right, title and seisin as of fee to and of the foreshore in question opposite to the county of Essex north and east and south-east of Havengore Creek as the same was more particularly delineated on the map annexed to the answer of the defendant Wintringham filed therein on the 5th of December 1883, and to and of every part of the said foreshore, and to and of a several fishery in the tidal waters coming and being over and upon the said foreshore and every part thereof, made an order that the decree of the Queen's Bench Division be reversed and the information dismissed with costs.

The evidence in the suit was voluminous and the arguments on this appeal occupied seventeen days in February and March 1891. Much of the time was taken up in discussing matters which are not the proper subject of a report here; e.g. the boundaries of the manors and the weight to be attached to particular portions of the evidence of title and to the evidence as a whole. For the purpose of this report, which is to record the decision upon the point of law stated in the head-note, it need only be said that the defendants established—indeed it was not now disputed—that their predecessors in title were as lords of the manors of Great and Little Wakering possessed of a several fishery over part of the foreshore. No original Crown grant of the several fishery was given in evidence.

Sir *Richard E. Webster* A.G. and *F. Vaughan Hawkins* (Sir *E. Clarke* S.G. and *Danckwerts* with them) for the appellant:—

The defendants' predecessors in title must have acquired the several fishery by a grant from the Crown before Magna Charta. Proof of the ownership of a several fishery is not evidence of the title to the soil. It will not be disputed that there may be a several fishery over part of the foreshore, and yet the foreshore be in the Crown. A mere grant of the foreshore between high

and low-water mark would not carry with it the right to a several fishery. Nor does the grant of a several fishery necessarily convey the soil. Primâ facie the soil under tidal waters is in the Crown, and that presumption has to be rebutted. The opinion in 2 Bl. Com. 8th ed. p. 39, to the effect that ownership of the soil is essential to a several fishery, is doubted in Hargrave and Butler's edition (1832) of Co. Litt. 122*a* note 7. Lord Coke's own opinion is that a grant of a several fishery did not convey the soil. He says (Co. Litt. 4*b*.): "So if a man be seised of a river, and by deed do grant separalem piscariam in the same, and maketh livery of seisin secundum formam chartæ, the soile doth not passe, nor the water, for the grantor may take water there; and if the river become drie he may take the benefit of the soile; for there passed to the grantee but a particular right, and the livery being made secundum formam chartæ cannot enlarge the grant. For the same reason if a man grant aquam suam the soile shall not passe, but the pischary within the water passeth therewith." Commenting on this passage, Bayley J. when delivering the judgment of the Court in *Duke of Somerset* v. *Fogwell* (1) says, "If then a fishery only is granted nothing passes but a right to take the fish and to use such means as are necessary for that purpose, which is in truth nothing more than a liberty to fish: the grantee has no property in the water, none in the soil. And this is the case where the grant is made between subject and subject, and consequently is to be construed against the grantor, a principle inapplicable to grants made by the Crown, whereby nothing passes unless the intention that it should pass is manifest." In that case the question was as to a several fishery in tidal waters, and the decision is a strong authority for the Crown. It is true that in *Holford* v. *Bailey* (2) Lord Denman C.J. delivering the judgment of the Queen's Bench said, "No doubt the allegation of a several fishery primâ facie imports ownership of the soil, though they are not necessarily united"; and Parke B. delivering the judgment of the Exchequer Chamber (3) said, "A several fishery is no doubt primâ facie to be assumed to be in the soil of the defendant, and therefore liberum tenementum

(1) 5 B. & C. 875, 884. (2) 8 Q. B. at p. 1016.
(3) 13 Q. B. at p. 444.

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is a good plea; and the plaintiff must reply by shewing a grant of a several fishery or a prescriptive right to one." It is also true that in *Marshall* v. *Ulleswater Steam Navigation Company* (1) the Queen's Bench (Wightman and Mellor JJ.) by a majority of one held that the allegation of a several fishery primâ facie imports ownership of the soil, though they are not necessarily united. But in the same case Cockburn C.J. though he deferred to authority expressed his own strong opinion that the doctrine of Lord Coke (Co. Litt. 4*b*.) was the only one reconcilable with principle or reason, and that a several fishery ought not to be considered as carrying with it, in the absence of negative proof, the property in the soil. This opinion of Cockburn C.J. is indorsed by Joshua Williams, Rights of Common, at p. 264. The last two cases were decided with regard to non-tidal waters, and there is no authority adverse to the Crown with regard to tidal waters. Whatever the presumption may be in non-tidal waters it is submitted that as against the Crown proof of the ownership of a several fishery over the foreshore raises no presumption that the property of the soil is in the grantee of the several fishery.

[They also referred to *Malcolmson* v. *O'Dea* (2); *Goodman* v. *Mayor of Saltash* (3); *Neill* v. *Duke of Devonshire* (4).]

Rigby Q.C. and *A. J. Ashton* (*Stuart A. Moore* with them) for the respondent Wintringham:—

A several fishery may no doubt exist without the ownership of the soil, but the presumption is that it does not. The case of *Duke of Somerset* v. *Fogwell* (5) relied on for the appellant is really an authority against him, for Bayley J. says that where the terms of the grant are unknown, the owner of a several fishery in tidal waters must be presumed to be the owner of the soil; and that is enough for the present purpose. The proposition established by that authority and by *Holford* v. *Bailey* (6) and *Marshall* v. *Ulleswater Steam Navigation Company* (1) is too well settled to be overthrown now.

(1) 3 B. & S. 732; 32 L. J. (Q.B.) 139.
(2) 10 H. L. C. 593.
(3) 7 App. Cas. 633.
(4) 8 App. Cas. 135.
(5) 5 B. & C. at p. 886.
(6) 8 Q. B. 1000, 1016; 13 Q. B. 426, 444.

Mirams, *S. Lynch*, and *F. Watt* for the respondent Sutton.

Sir *Richard Webster* A.-G. in reply.

The House took time for consideration.

1891. May 12. LORD HERSCHELL :—

My Lords, this appeal arises on an information filed by the Attorney-General praying that the title of Her Majesty in right of her Crown to the foreshore of the sea opposite to the coast of Essex, north and east of Havengore Creek, might be declared and established, and that the defendants might be declared not to be entitled to that foreshore, and might be restrained from disturbing Her Majesty or her officers in the possession thereof.

It is beyond dispute that the Crown is primâ facie entitled to every part of the foreshore between high and low-water mark, and that a subject can only establish a title to any part of that foreshore, either by proving an express grant thereof from the Crown, or by giving evidence from which such a grant, though not capable of being produced, will be presumed. The question is whether the respondents who claim the foreshore as being within, or belonging to, the manors of Great or Little Wakering, have made out their case. The Queen's Bench Division held that they had not done so. They considered that the evidence established only that the defendants were entitled to a several fishery over a portion of the foreshore claimed, and that no part of the soil was vested in them. The Court of Appeal reversed this judgment, holding that the defendants had made out a title to the whole of the foreshore which they claimed. Hence the present appeal.

Two questions are in controversy between the parties; first, whether the defendants are entitled to any part of the foreshore; and secondly, if so, within what limits that right has been established. It will tend to clearness if these two questions, i.e., the question of title, and that of boundary, be kept distinct. I propose, therefore, in the first place, to consider whether the defendants have established a title to any part of the foreshore claimed, putting aside for the present the question of boundaries.

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The manors of Great and Little Wakering, as well as Foulness and some other manors, appear to have been carved out of the honor of Raleigh. The boundaries of the manors of Great and Little Wakering are not very clearly defined, and there is some dispute as to the extent to which these manors adjoin the shore. But I do not think it is open to serious doubt that they extend along the coast-line as far eastward as Shelford Creek, though for a short distance a portion of another manor intervenes between parts of the manors of Great and Little Wakering. It was contended on behalf of the Crown that the shore boundary of these manors did not go northward and eastward beyond Havengore Creek; but in view of the evidence before your Lordships, and especially that afforded by the survey of 1598, I think this contention quite untenable.

It is not now in dispute that the defendants are possessed of a several fishery over a part of the foreshore; but it is said, and truly, that this is not inconsistent with the foreshore over which this right is possessed being still in the Crown. A grant of the foreshore between high and low-water mark admittedly would not of itself convey the right to a several fishery over it. On the other hand, a several fishery might be granted independently of the ownership of the soil. But it is said that the possession of a right of several fishery is evidence of the ownership of the soil over which it is exercised. It has undoubtedly been laid down in more than one case that the ownership of a several fishery raises a presumption that the freehold is in the grantee of the several fishery. And Parke B. in delivering the judgment of the Exchequer Chamber in *Holford* v. *Bailey* (1) said: "A several fishery is, no doubt, primâ facie to be assumed to be in the soil of the defendant." And although in *Marshall* v. *Ulleswater Steam Navigation Company* (2) Cockburn C.J. stated that apart from authority he should have come to a different conclusion, the Court adopted the law laid down in *Holford* v. *Bailey* (1).

But it was argued before your Lordships that there was no ground for such a presumption in the case of tidal waters, the soil below which is primâ facie in the Crown, and where a several

(1) 13 Q. B. at p. 444. (2) 3 B. & S. 732; 32 L. J. (Q. B.) 139.

fishery must have been the subject of a separate grant. In support of this distinction the case of *Duke of Somerset* v. *Fogwell* (1) was cited. But I do not think the judgment in that case warrants the proposition for which it was cited. Bayley J., who delivered the judgment, said: "It was contended in argument that the owner of a several fishery must be presumed to be the owner of the soil. That may be true where the terms of the grant under which he claims are unknown; but where they appear and are such as convey an incorporeal hereditament only, the presumption is destroyed." It is unnecessary to inquire whether the conclusion arrived at in that case, that the terms of the grant were known, was correct; the presumption, so far from being denied, appears to me to be recognised.

Finding, then, such high authority for the proposition that the ownership of a several fishery is evidence of the ownership of the soil, I am not disposed to depart from it. Nor am I inclined to inquire upon what basis it rests, though in former days the exclusive right of fishing over the foreshore being, no doubt, the most valuable right of property connected with it, it may have been thought probable that where this right was granted, either the fishery would be conferred upon one who was already owner of the soil, or the soil would be granted with it. But proof of the ownership of the fishery is, of course, evidence only of a title to the soil, capable of being rebutted, and the weight of which must depend upon the other circumstances of the case, which may shew it to be of but little importance.

In the present case the respondents do not rest their case merely upon the possession of the several fishery; they place great reliance upon the character of the fishing rights which they enjoyed. I will deal presently with the evidence by which they establish these rights; in the meantime I limit myself to a statement of their nature. Besides the possession of mussel and oyster beds, they enjoyed and exercised the right of fishing by means of kiddles. A kiddle consists of a series of stakes forced into the ground, occupying some 700 feet in length, with a similar row approaching them at angle. The stakes are connected by network, and at the angle where the two rows approach a

(1) 5 B. & C. at p. 886.

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large net or bag is placed for the purpose of catching the fish. These stakes are not moved from tide to tide, the erection of a kiddle necessarily occupying a considerable time. They remain in the same place often for a lengthened period, sometimes until the stakes become decayed from exposure to the action of the sea.

Lord Hale, in distinguishing the several kinds of fishery, uses the following language: "Fishing may be of two kinds ordinarily, viz., the fishing with the net, which may be either as a liberty without the soil, or as a liberty arising by reason of and in concomitance with the soil, or interest or propriety of it; or otherwise it is a local fishing that ariseth by and from the propriety of the soil. Such are gurgites, weares, fishing places, borachiæ, stachiæ, &c., which are the very soil itself, and so frequently agreed in our books" (1).

Much learning was displayed in the effort made at the Bar to explain the exact meaning of the different words used by Lord Hale in this passage. I do not think it necessary to follow the learned counsel in their endeavour to distinguish with precision between the various erections or constructions enumerated. I think they all have this in common, that they are constructions or erections by which the soil is more or less permanently occupied, and that it is this occupation of a portion of the soil which leads Lord Hale to say that they are "the very soil itself." I invited the learned counsel for the appellant to cite any authority for the proposition that the mere grant of a several fishery conferred the right thus to occupy the soil. They were unable to do so. It may be that the temporary driving one or more stakes into the foreshore, as, for example, to hold a net in its place during a single tide, might be regarded as ancillary to the grant of a several fishery. But I do not think constructions of the nature specified by Lord Hale can be so regarded. It need not be determined on the present occasion whether the right to maintain such structures as Lord Hale refers to necessarily imports in all cases the ownership of the soil, nor whether a kiddle such as has been proved to be in lawful use on the foreshore in question falls within the class

(1) Hale, De Jure Maris, Pars Prima, cap. 5 p. 18, Hargrave's Tracts.

specified by Lord Hale. It is impossible, I think, to deny that the right to maintain such a kiddle affords cogent evidence that the person possessing this right is the owner of the soil. The respondents, however, do not place their reliance upon this alone, and I proceed now to consider the further evidence which they have adduced in support of their title to the foreshore.

The origin of the manors of Great and Little Wakering is traced back to a period anterior to Domesday Book. The two manors came into the same possession in 1272, and this unity of possession has continued down to the present time. For all practical purposes they may now be treated as one. They were the property in 1419 of Joan Countess of Hereford. She died on the 7th of April in that year, leaving as her heirs Henry V. and the Countess of Stafford. Upon the death of the Countess of Hereford, the manors were taken into the hands of the Crown, and a receiver was appointed to receive the profits. William Daunger was the bailiff of the manors, and rendered his account of the profits of the same, treating them as one manor, from March 1419 to May 1421, when a partition of the estates of the Countess of Hereford was made between the King and the Countess of Stafford, by which partition the manors were assigned to the latter. The first document with which I need trouble your Lordships is this account of William Daunger. It is obviously of great importance, inasmuch as the manors were at that time in the hands of the Crown, and there can be no doubt that the document is not only evidence as against the Crown, but evidence of weight. The bailiff renders an account amongst other things of "25*s.* 6*d.* of the rents of kiddells and other fisheries upon the sands of Wakeryng," of "12*d.* of new rents for one summer kiddell upon the sands of Wakeryng between the Havene and Waterflete," of "12*d.* of new rent for one summer kiddell upon the sands of Wakeryng between Barmflete and Waterflete," and of "6*d.* new rent for one place upon the sands of Wakeryng between Babblehole and Bayone-sand near the Swene, containing the space of half a leuca for placing fish-hooks thereupon." Account is also rendered of 12*d.* new rent "for one place upon the sands of Wakeryng, between the kiddell of Thomas London on the south part, and

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the way called Bromway towards the north, for erecting one summer kiddell there so demised to him and his heirs by the year." And there are other similar entries relating to "places on the sands," and "kiddell places." I may observe, too, that the entries indicate that these holdings did not originate at that time, but that the original demises were of earlier date.

The Court Rolls of the manors are in existence, with some breaks, from a period prior to the close of the 15th century down to the present time. From these it appears that for centuries there have been demises by copy of Court Roll in such terms as these: "One keddell of the lord upon the sand of the lord"; "all those kedil places"; "one other croft called Fishing Croft, being a parcel of fishing land lying in the sea"; "one piece of fishing land called Fishing Croft, containing by estimation "; "one parcel of fishing land"; and "fishing lands." Some of these demises are at a yearly rent, "as appears by the copy of the Court Roll." The title to these copyhold tenements is traced down to the present time, and there is evidence of modern enjoyment under some of them, at all events, even though there may, at this date, be some difficulty in precisely determining which. It was contended, on behalf of the Crown, that the modern user alone was to be looked at, and that these entries in the Court Rolls were not evidence as against the Crown. If there were no evidence of acts of user within the time of living memory, this contention might, perhaps, be well founded; but where there is such evidence I cannot accede for a moment to the argument that you are to shut your eyes to what is called the paper title. A demise by copy of Court Roll is an assertion of a right of ownership; enjoyment under it is evidence of ownership. And, at any rate, where there is proof of modern enjoyment, it may be presumed that there was enjoyment under such demises during the period before living memory. But in the present case, as I have shewn, there is evidence that five centuries ago the lords of these manors granted by copy of Court Roll "kiddle places" and "places upon the sands," and reserved rent thereon, and that there was enjoyment under these grants; for the bailiff renders an account to the Crown of the receipt of the rents, thus

bringing to the notice of the Crown the rights which were being granted upon the foreshore.

What, then, is the proper inference to be drawn from all these facts, bearing in mind what a kiddle is, and what is involved in the grant of a place on the sands "for erecting a kiddle thereon." The learned counsel for the Crown contend that they indicate no more than the parcelling out of a right of several fishery which was vested in the lord. They are compelled to admit that nothing can be demised by copy of Court Roll which is not parcel of the manor. But they insist that a right of several fishery, which is "appurtenant" to a manor, may be granted by copy, although the right be not exercisable within the ambit of the manor. This position was denied by counsel for the respondents, and much learning was expended in the discussion of the point. I confess the argument for the Crown did not convince me that their position could be maintained. But the matter is involved in some obscurity, and I do not purpose pronouncing an opinion upon it. It would be very material if the respondents' case rested merely upon this, that the fact that the kiddle and other fishing places had been demised by copy of Court Roll proved that the land over which they were to be exercised was within and part of the manor; but this is not so. I have already brought to your Lordships' notice other considerations which point in that direction. Why, then, should resort be had to the explanation, supposing it to be a possible one, suggested on behalf of the Crown, instead of adopting what seems the more natural and ordinary inference, when the latter is in harmony with the other facts of the case? The same may be said of the explanation proffered with regard to the reservation of rent on the copyhold grants, that, although rent cannot be reserved on the grant of an incorporeal hereditament, a payment made in respect of it might, by a not uncommon inaccuracy of language, be called rent. This is no doubt possible, and might be accepted as sufficient, if the other facts indicated that the grants had reference to an incorporeal hereditament. But I think the fallacy involved in much of the argument for the Crown lies in a want of recognition of the force of a combination of facts, all pointing in the same direction, each one of which, standing alone,

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might admit of a plausible explanation not inconsistent with that argument.

When the character of the fishing rights possessed, the terms in which they have been granted, and the nature and incidents of the grants are borne in mind, and it is remembered that the inland fletes over which the tide equally flows and reflows are, if not admittedly, at least I think clearly proved to be vested in the defendants, these facts, taken together, are cogent to shew that the soil of the foreshore, over which the defendants' fishing rights extend, is their property.

But I have not yet exhausted the evidence adduced in support of this view. The lords of the manor are undoubtedly entitled to the wreck which comes on the foreshore. This clearly appears from the bailiff's accounts of 1419. The entries in the Court Rolls relating to the assertion of this right commence in the reign of Henry VIII. and continue down to recent years. The wreck is described as coming "within the precincts of this leet"; "within this lordship"; "upon Wakeryng sands within the precinct of this manor"; "within the jurisdiction of this Court," and so on. In some cases the homage present that a named person had taken and carried away wreck of the sea, and an order is made to seize and answer to the lord. And, in one case, on the petition of the possessors, and on account of their great damage sustained by shipwreck, the lord gave command that for the fine of 5*s.* the wreckage be rendered to the true possessors. Lord Hale, speaking of the foreshore, says: "It may not only be parcel of a manor, but it de facto many times is so, and perchance it is parcel almost of all such manors as by prescription have royal fish or wrecks of the sea within their manor (1)."

The learned counsel for the Crown insist that the right to wreck on the foreshore is a franchise which may be granted independently of the soil. No doubt this is so. But I think it is impossible to deny that the evidence to which I have called attention favours the view that the foreshore is within the manor and the property of the lord; and the more so when it is observed that the lord was also entitled to the royal fish, and

(1) Hale, De Jure Maris, Pars Prima, cap. 6 p. 27, Hargrave's Tracts.

that entries with reference to the assertion of this right are to be found in the Court Rolls very similar in their terms to those relating to wreck.

One other piece of evidence remains. In 1612 Sir George Coppin purchased the manor and lands of Wakering from the then lord for a sum exceeding £14,000. Shortly afterwards, James I., under the proceedings for curing defective titles, made a grant to Sir George Coppin for the amendment of the defective title to the manor of Wakering. This instrument purports to be made in consideration of the sum of £166 13*s.* 4*d.* I will assume that it would have been invalid as a new grant for lack of certain preliminary proceedings. But it does not purport to be such. It is clearly a grant by way of confirmation. The King grants and confirms the lordships and manors of Great and Little Wakering, with all their "rights, members, and appurtenances." He also grants and confirms all "lands within the flux and reflux of the sea . . . . adjacent to the aforesaid manors . . . . and situate, lying, or being between the manors and tenements aforesaid and the high sea." The Attorney-General contended that this shewed that the foreshore was outside and not within the manors. I do not think so. The manors, with their appurtenances, had already been confirmed. When the form of the instrument is looked at it is clear that the conveyancer would, in any event, introduce the words I have quoted by way of precaution, in case the foreshore or any part of it should happen to be without the manors. At all events, the confirmation appears to me to be a clear recognition by the Crown that the foreshore between the land boundary of the manors and low-water mark was vested in the lord.

I have dealt so far with the evidence by which the defendants, on whom the burden rests, have sought to establish their case. What is there on the other side? Evidence was given that in modern times, when the fishing had become much less important and valuable than formerly, many persons, without authority, have fished with kiddles upon the sands in question. I fail to see the importance of this evidence. It was obviously an encroachment on the right of fishery admittedly possessed by the lords, and does not appear to me to throw any light on the

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question whether the soil also was vested in them. There was evidence also that the sand of the foreshore had been taken from time to time for the purpose of ballast. The parts of the foreshore from which it was taken are not very clearly defined. I think it probable that the ballasting largely took place in the neighbourhood of the Ridge, beyond the limits of the foreshore in question. But, however this may be, the evidence is, I think, of little importance. The public do not possess any right thus to take the soil of the foreshore, even if be vested in the Crown. And the only weight of the evidence is derived from the fact that a private owner of the foreshore would be more likely to know of the encroachment and to prevent it than the Crown would. But when all the circumstances are looked at, its weight in the present case appears to me to be of the slightest. Only one act of ownership by the Crown is asserted. It is said that beacons, for the purpose of the measured mile, were placed by the Admiralty on the foreshore. But when it is remembered that the Crown would have a right so to place all beacons necessary for purposes of navigation, even though the foreshore were vested in the lord of the manor, the fact that he took no exception to the erection of the measured mile beacons cannot count for much. The fact that the Crown in 1854 took from the then lord of the manor a lease of a portion of the foreshore, not distinguished by any natural feature from the immediately adjoining part now in dispute, is of at least as much weight on the other side.

I have now completed my review of the evidence bearing on the question of right, and the balance seems to me overwhelmingly in favour of the view adopted by the Court below, that the respondents are the owners of all that part of the foreshore over which their fishing rights extend.

I pass now to the question between what boundaries these rights have been proved to exist. I start with the western boundary, about which there can be no question. It is sufficiently defined by the lease granted to the Crown in 1854. There is no difficulty about the part of the foreshore immediately east of that leased to the Crown. It is well identified as the site of the fishery called Le Haven. And there is ample evidence that fishing rights were granted and exercised as far north-eastward as Shelford Creek, which was formerly known as Barnflete. The

Queen's Bench Division was favourable to the respondents' claim, so far as the fishery was concerned, over that part of the foreshore. I do not think there is any doubt that fishing rights of the nature I have described were enjoyed still further to the eastward. The fishing grounds demised by copy of Court Roll are in some cases defined by boundaries drawn through two points on the mainland down to low-water mark. About the position of some of these boundary lines there is no dispute. The position of others has been contested. But there is no real contest as to the one described as a line through Raleigh Church and Newmarsh House. It appears to have been admitted in the Court of Appeal that it occupied the position assigned to it by the respondents. At all events, I do not think there is any substantial doubt of the fact. Now this line was, beyond question, the southern boundary of a fishing place in the manor of Wakering, which the respondents suggest was that termed Le Sand, which it is clear must have occupied the position ascribed to it. It is to be observed that one fishing place is described as "*versus* the Showe," whilst in the 38th of Queen Elizabeth, at a Court of the manor of Wakering, the jurors presented that certain wreck came "upon the sand at Sue-beacon, within the precinct of this manor." I cannot doubt that the reference is to the Shoe Hole or Shoe Beacon. And the affidavit of Commander Hull has satisfied me, that the Shoe Hole and the neighbouring beacon occupy now substantially the same position as at the time referred to. And going westward and southward, I find a parcel of fishing land demised under the name of Mablynge Swene, of which the northern boundary is the line passing through Raleigh Church and Newmarsh House. The southern boundary of this is stated to be a line through Southminster Park and Newick House. This is the boundary line fixed with least certainty. But I think its position is sufficiently established, for south-west of it lay another fishing croft and kiddle places of which it is described as the northern boundary, the western being the line drawn through Shelford House and the church of Canewdon, the position of which is undisputed. It must therefore have lain somewhere between the latter line and that passing through Raleigh Church and Newmarsh House. Under the circumstances

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I think the identification of the site of Newick House is reasonably probable, and I have no hesitation in adopting it. There is evidence, too, of the existence of a fishing ground west of the Canewdon Church line, between that and an admitted line described as Sharpness Wall or New England House.

In my opinion then it is established that the fishing grounds of the lords of the manor of Wakering existed down to low-water mark along the whole of the foreshore claimed.

It is clear, however, that the boundary of the Wakering Manor did not along its entire course extend to high-water mark. Some parts of the foreshore between that claimed by the defendants and Foulness Island were undoubtedly in the manor of Foulness. And it must be admitted, that there is some difficulty in fixing the boundary between the two manors. I think it is clear that near the land Shelford Creek, otherwise Barnflete, formed that boundary. In the account of William Daunger, bailiff of the Countess of Hereford, who was lord of the manor of Foulness, he answers, for "6*d.* of John-at-Bridge, for one summer kiddle nigh Barnflete," and for "8*d.* by the year, for the rent of John Mochill, for having one summer kiddell upon the sand between the kiddell of John-at-Bridge and Barnflete." I think it probable that the waters of Barnflete, issuing in an easterly or north-easterly direction, created a natural division between the two parts of the sand to a greater distance from high-water mark than at present. There is strong evidence that north-east of Barnflete the boundary between the two manors was somewhere upon the foreshore, and the half ebb appears in the case of some of the fishing places to have been regarded as the boundary. For a long series of years the same persons who were copyhold tenants of certain of the Wakering fishing places held also by copy of Court Roll fishings of the manor of Foulness. In the middle and towards the end of the 18th century several of the parcels in the manor of Wakering, that is to say, those known as Southcroft, Mablyn Swin, and Le Sand, came into the possession of the Lodwick family, who were possessed about the same time or earlier of kiddles or fishing places in the manor of Foulness. And these tenements remained in the same family until quite recently. During the whole period, therefore, covered by living memory, the fishings held

by that family in both manors have been held and let indiscriminately, which is quite sufficient to explain why the foreshore boundary between the two manors should have ceased to be distinguished with accuracy. But I think it did, as suggested by the defendants, run along the course of a low way beginning in the neighbourhood of the Maplin Buoy, down to the junction of that low way with Barnflete, the inner or landward side of this waterway belonging to Foulness and the outer to Wakering. The evidence, in my opinion, suffices to shew that such a low way did exist, and was in all probability of a more marked character formerly than at present.

I have come, therefore, without hesitation, to the conclusion that the defendants have established their case, and that the judgment of the Court of Appeal was right, and ought to be affirmed.

My Lords, my noble and learned friend the Lord Chancellor has asked me to say that he entirely agrees with the opinion I have just delivered to your Lordships.

LORD BRAMWELL:—

My Lords, at the conclusion of the argument in this case, my opinion was in favour of the respondents—that the judgment should be affirmed. I have had the advantage since then of reading the opinion which has just been delivered by my noble and learned friend on the Woolsack. I concur entirely in his arguments and in the conclusion that he has come to, and I have nothing to add to what he has said.

LORD MACNAGHTEN:—

My Lords, I entirely concur.

LORD HANNEN:—

My Lords, I also concur.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 12th May 1891.

Solicitor for appellant: *T. W. Gorst, Solicitor, Office of Woods, &c.*
Solicitor for respondent Wintringham: *F. E. Goodhart.*
Solicitor for respondent Sutton: *G. Thatcher.*

[HOUSE OF LORDS.]

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JOHN DERBY ALLCROFT AND OTHERS (PROSECUTING ON BEHALF OF THE QUEEN) — APPELLANTS;

AND

THE LORD BISHOP OF LONDON AND THE DEAN AND CHAPTER OF THE CATHEDRAL CHURCH OF ST. PAUL IN THE CITY OF LONDON . . . — RESPONDENTS.

SIR CHRISTOPHER ROBERT LIGHTON AND OTHERS (PROSECUTING ON BEHALF OF THE QUEEN) . . . . . — APPELLANTS;

AND

THE LORD BISHOP OF LONDON AND THE DEAN AND CHAPTER OF THE CATHEDRAL CHURCH OF ST. PAUL IN THE CITY OF LONDON. . . . — RESPONDENTS.

Ecclesiastical Law—Public Worship Regulation Act 1874 (37 & 38 *Vict. c.* 85) *ss.* 8, 9—*Bishop's Discretion to stop Proceedings on Representation—"After considering the whole circumstances of the case"—Refusal or Excess of Jurisdiction—Mandamus.*

By s. 9 of the Public Worship Regulation Act 1874 it is provided that where a representation has under s. 8 been sent to the bishop of the diocese complaining of an unlawful alteration in or addition to the fabric, ornaments or furniture of a cathedral church, the bishop shall take certain specified steps to have the matter of the complaint tried in one of the ways prescribed by the Act "unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, in which case he shall state in writing the reason for his opinion" &c.

A representation was sent to the Bishop of London complaining that the Dean and Chapter of St. Paul's Cathedral Church had set up on a reredos in that church images of Our Lord and of the Virgin and Child and that the images tended to encourage ideas and devotions of an unauthorized and superstitious kind and were unlawful. The bishop replied that having in pursuance of the Act considered the whole circumstances attending the representation he was of opinion that proceedings should not be taken for reasons which he stated at length, the reasons being based upon his view of the decision in *Phillpotts* v. *Boyd* (L. R. 6 P. C. 435) as affecting the present case and upon the mischievous results which such litigation would

in his opinion cause. On an application for a mandamus to compel the bishop to proceed according to the Act, upon the ground that the bishop's reasons shewed that he had not considered the whole circumstances of the case and also had considered matters which were not circumstances of the case, the Court of Appeal held (24 Q. B. D. 213) that there did not appear to be any ground for either contention and that a mandamus ought not to issue.

While the appeal from that decision was pending in this House a second representation was made to the bishop with regard to the same images and in similar terms, with the additional allegation that the images had in fact encouraged idolatrous and superstitious ideas and devotion, and that idolatrous and superstitious reverence had been paid to them. The bishop replied that having considered the whole circumstances attending the representation he was of opinion that proceedings should not be taken for the reason that the questions raised in the case were in substance identical with those raised in the first case, and that the appeal in the first case was then pending in this House. A similar application for a mandamus having been made the Court of Appeal, affirming the decision of Hawkins J. ([1891] 2 Q. B. 48), held that there was no ground for the mandamus:—

Held, affirming the decision of the Court of Appeal in each case, that the bishop had acted within his jurisdiction and exercised the discretion vested in him; that whether the reasons he gave were good or bad, the bishop having considered all the circumstances which appeared to him, honestly exercising his judgment, to bear upon the particular case, his reasons could not be reviewed; and that there was no ground for a mandamus.

THESE two appeals were from two orders of the Court of Appeal made under the following circumstances:—

In the first appeal, *Allcroft* v. *Bishop of London*, the prosecutors (the present appellants), being persons qualified so to do under the Public Worship Regulation Act 1874, made a representation in the prescribed form to the bishop stating:

1. That the Dean and Chapter of the Cathedral Church of St. Paul, in the city of London, within five years before the date hereof, that is to say in the month of January, 1888, have introduced into the said cathedral church and set up upon the altar piece or reredos therein, an image or sculptured subject, representing Our Lord upon the cross, in a conspicuous position, immediately above the communion table, the figure of Our Lord being of the height of five feet or thereabouts.

2. That the said image or sculptured subject is constructed so as to have the appearance of such an altar crucifix as was used in

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the Church of England immediately before the Reformation, and so as to answer the purposes for which such a crucifix was intended.

3. That the said dean and chapter, within five years before the date hereof, that is to say, in the month of January, 1888, have introduced into the said cathedral church and set up upon the said altar piece or reredos therein, an image or sculptured subject, representing the Blessed Virgin Mary, with the Child in her arms, in a conspicuous position, a few feet above the firstly herein mentioned image or sculptured subject, the figure of the Blessed Virgin being of the height of five feet six inches, or thereabouts.

4. That each of the said images or sculptured subjects tends to encourage ideas and devotions of an unauthorised and superstitious kind, and is unlawful.

5. That the said images or sculptured subjects are respectively additions to the fabric ornaments or furniture of the said cathedral church, and are decorations forbidden by law.

The bishop being of opinion that proceedings should not be taken on the representation, in pursuance of sect. 9 of the Public Worship Regulation Act 1874, stated in writing as follows his reason for the opinion.

"We, Frederick, by Divine permission Bishop of London, having, in pursuance of the provisions of the Public Worship Regulation Act considered the whole circumstances attending the above representation, are of opinion that proceedings should not be taken thereon for the following reason:—

"The proposed proceedings have for their object the determination of the question whether a reredos, shewing Our Lord on the cross in a conspicuous position immediately above the communion table, and also the Blessed Virgin Mary with the Child in her arms in a conspicuous position a few feet above, has any tendency to idolatry, and whether its erection is permitted by law.

"The main question of principle here at issue has been already decided in the Exeter case: *Phillpotts* v. *Boyd* (1). In that case the reredos shewed a figure of Our Lord in the act of ascending to heaven in a conspicuous position immediately above the

(1) Law Rep. 6 P. C. 435.

communion table, and this reredos was held to be lawfully erected.

"The sole object of the proceedings now proposed is merely to determine whether there may be exceptions to the principle laid down in the Exeter case (1), and whether the reredos now erected in St. Paul's is such an exception. It appears to me impossible to say that the difference between the two erections is of very grave importance, or that one offers serious temptations to idolatry and the other does not.

"Litigation in these matters is sometimes necessary in order to settle disputed points of grave importance. But even in such cases litigation is a necessary evil. It keeps up irritation and party strife, it embitters men's feelings, it inflicts much mischief in the Church and in true religion, and it is only tolerable as a preventive of worse mischief that would otherwise follow.

"It is always possible after any great question of principle has been decided to keep up litigation indefinitely by raising minor points, and such litigation becomes more mischievous the longer it is continued, while the results obtained from it are of exceeding little value.

"I am satisfied that in the present instance the proceedings could not end in any result which would make up to the Church and to the religious life of the country for the mischief which must inevitably be inflicted on them by the litigation itself."

The prosecutors then obtained a rule nisi for a mandamus to the bishop commanding him to transmit a copy of the representation to the Dean and Chapter of St. Paul's and to proceed thereon further in accordance with the Public Worship Regulation Act 1874; or, in the alternative, commanding him to proceed to consider the whole of the circumstances of the case affecting such representation, without considering any other circumstances or taking into consideration reasons other than the circumstances of the case. After argument the Queen's Bench Division (Lord Coleridge C.J. and Manisty J., Pollock B. dissenting) made an order absolute for a peremptory writ of mandamus in the first of the two alternative forms mentioned in the rule nisi (2). This decision was on the 17th of December

(1) Law Rep. 6 P. C. 435. (2) 23 Q. B. D. 414.

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1889 reversed by the Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ.) and the order of the Queen's Bench Division was discharged with costs (1).

In the second appeal, *Lighton* v. *Bishop of London*, the circumstances were as follows:—While the appeal to this House in *Allcroft's Case* was pending a representation was made to the bishop by Sir C. R. Lighton and others with regard to the same reredos. The representation was similar to that in *Allcroft's Case* except that it contained in addition the following allegations:—

"4. The said two images or sculptured subjects and each of them tend and tends to encourage ideas and devotions of an unauthorized, idolatrous and superstitious kind, and are and is in danger of being abused, and unauthorized, idolatrous and superstitious regard and reverence are likely to be paid to the said two images or sculptured subjects and each of them, all which allegations we are prepared to establish by evidence or otherwise, at the hearing and trial of the suit or proceedings hereby commenced.

"5. The said two images or sculptured subjects and each of them have and has in fact encouraged ideas and devotion of an unauthorized, idolatrous and superstitious kind, and have and has been in fact abused, and unauthorized, idolatrous and superstitious regard and reverence have been in fact paid to the said two images or sculptured subjects and each of them, all which allegations we are prepared to establish by evidence and otherwise at the aforesaid hearing and trial.

"6. The setting up of the said images or sculptured subjects and of each of them tends to bring about and has in fact brought about breaches and violations of the 22nd Article of Religion, which allegations we are prepared to establish by evidence and otherwise at the aforesaid hearing and trial."

To this representation the bishop replied as follows:—

"We, Frederick, by Divine permission Bishop of London, having in pursuance of the provisions of the Public Worship Regulation Act 1874 considered the whole circumstances attending the above representation, are of opinion that proceedings

(1) 24 Q. B. D. 213.

should not be taken thereon for the following reason (videlicet):—

"That the questions raised in this case are in substance identical with those raised in the case of the representation of Allcroft and others against the Dean and Chapter of St. Paul's and the application for a mandamus by Allcroft and others against us, and that such application is now pending on appeal to the House of Lords and will shortly be ready for hearing by that tribunal."

A rule nisi was obtained for a mandamus in a form similar to that granted in *Allcroft's Case*. That rule was after argument discharged, the Court being equally divided, Hawkins J. being of opinion that a mandamus should not issue, and Stephen J. being of opinion that it should (1). The order of the Queen's Bench Division discharging the rule nisi was affirmed by the Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.) on the 2nd of December 1890, their Lordships being of opinion that the case was governed by the reasons given by the Court of Appeal in *Allcroft's Case*.

April 30, May 1, 4. Sir *Henry James* Q.C. and *Moulton* Q.C. (*Danckwerts* and *Cecil Bovill* with them) for the respondents:—

First, as to the first appeal, *Allcroft* v. *Bishop of London*.

The discretion given to the bishop by the Public Worship Regulation Act 1874 is not an absolute discretion such as was given in the Church Discipline Act by the words "it shall be lawful": *Julius* v. *Bishop of Oxford* (2). There are no such words in the Public Worship Regulation Act. Sect. 8 provides that a representation may be made by certain qualified persons in the diocese who are of opinion that (inter alia) any alteration or addition to the fabric or ornaments in a cathedral church has been made without lawful authority. Then by sect. 9 the bishop "shall" within twenty-one days transmit a copy of the representation to the person complained of and pursue the course pointed out by that section for adjudication on the representation, unless he shall be of opinion "after considering the whole circumstances of the case" that proceedings should not

(1) [1891] 2 Q. B. 48. (2) 5 App. Cas. 214.

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be taken on the representation. In the latter case he "shall state in writing the reason for his opinion, &c." There is therefore a statutory duty on the bishop to take the necessary steps to have the representation adjudicated upon unless he forms the opinions pecified. That is a condition precedent. He must form the opinion, and he must form it "after considering the whole circumstances of the case": otherwise the proceedings must go forward. He is not entitled to stay them unless he complies precisely with the statutory requirements. If he does not consider all the circumstances of the case, or if though he considers all the circumstances of the case he considers other matters which are not "circumstances of the case," he does not follow the statute. It lies on the bishop to shew that he has neither declined jurisdiction by failing to consider all the circumstances of the case, nor exceeded his jurisdiction by considering foreign or irrelevant matters. The Act manifestly contemplates the bishop's exercise of jurisdiction being reviewed, for it requires him to state in writing the reason for his opinion and transmit a copy to one of the persons making the representation and to the person complained of. If the reasons he states are not founded on the whole circumstances of the case a mandamus lies directing him to take the necessary steps to have the representation adjudicated upon. And that is so if any one of the reasons is founded on irrelevant grounds, even though the rest are sound, for it is impossible to say which reason turned the scale. In the present case the reasons given by the bishop shew that his opinion is not the judicial opinion required by the statute; it is unsound on both grounds; he has not considered all the circumstances of the case and he has considered other matters which are not part of the circumstances of the case. The bishop was misled by a misconception of the real effect of the decision in *Phillpotts* v. *Boyd* (1). There it was held that the reredos consisting of certain figures was not illegal. But there was no cross and no crucifix and the figures were not of an idolatrous tendency. In the present case the gist of the representation is that the images tend to idolatrous and superstitious ideas and devotions. The bishop has not considered the

(1) Law Rep. 4 A. & E. 297; Law Rep. 6 P. C. 435.

reredos in the present case: he has considered what the Privy Council said about a different reredos. The decision in *Phillpotts* v. *Boyd* (1) does not govern the present case, but the bishop treats it as if it did. All that was decided there was that a reredos representing the Ascension, the Transfiguration, and the Descent of the Holy Ghost on the Day of Pentecost, being merely a decoration representing historical events, was not illegal. That decision laid down no general rule: every case must be decided on its own merits; and this case must be decided independently of that decision. The bishop's misunderstanding of the decision has induced him not to consider the real nature and effect of the reredos now in question. Again the bishop's observations as to the evils of litigation shew that he has considered matters which were not within his province. The Act contemplates litigation and provides for it: the bishop considers litigation mischievous and for that reason declines to carry out the statutory provisions. The bishop has thus shewn that he has not exercised his discretion in a judicial manner. There must be some means of reviewing the bishop's discretion. Supposing he said—or it was notorious that he thought—that the Act was mischievous and that there never ought to be any proceedings under it. Such an exercise of discretion is no exercise at all and a mandamus lies directing him to exercise it: *Reg.* v. *Boteler* (2). The mandamus should therefore issue—if not in the first of the two alternatives —certainly in the second.

Secondly, as to the second appeal, *Lighton's Case*, the same observations apply. But there is a stronger ground for the appeal. The representation contains a distinctly fresh charge: it states that the figures on the reredos not only tended to encourage, but had in fact encouraged, idolatry and superstition; and that idolatrous and superstitious regard had been in fact paid to them. The bishop's reply ignores these allegations, shewing that he had not considered one of the most important circumstances of the case, and gives as a reason for not complying with the Act that the appeal in the first case was pending in this House. That is no reason at all: the two cases are not identical: in the first the application might fail while it suceeded in the second.

(1) Law Rep. 4 A. & E. 297; Law Rep. 6 P. C. 435. (2) 4 B. & S. 959.

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Sir *R. Webster* A.G., Sir *W. Phillimore* and *Lewis Coward*, who appeared for the respondents in both appeals, were not heard.

The House took time for consideration.

July 20. LORD HALSBURY L.C.:—

My Lords, under the Public Worship Regulation Act 1874 (Section 8) certain persons therein described are made competent as complainants, if in any cathedral or church alterations or additions to the fabric, ornaments, or furniture thereof have been made without lawful authority, or if any decoration forbidden by law has been introduced into such cathedral or church. The required number of persons competent under the section in question have in due form made a complaint as follows:—[His Lordship read the representation made in *Allcroft's Case*, set out above.]

This representation was duly forwarded to the Bishop of London. The bishop, if he had thought proper, might have taken proceedings thereon as provided by the Act; but the bishop has been of opinion that proceedings should not be taken, and the bishop is the only person who by law has jurisdiction to form an opinion on the subject. There is no right of appeal from his judgment. It is a jurisdiction confined by the Legislature to the bishop himself, and there is no power by law to interfere with the judgment which the bishop may form on the subject. But by the 9th section it is provided that, "Unless the bishop shall be of opinion, after considering the whole circumstances of the case," that proceedings should not be taken on the representation (in which case he shall state in writing the reason for his opinion), he shall, within twenty-one days after receiving the representation, proceed in pursuance of the provisions of the Act.

A peremptory writ of mandamus was obtained on the 1st of June 1889, directing the bishop to proceed in pursuance of the Act, notwithstanding that on the 23rd of May 1888 the bishop had sent, in pursuance of the Act, a statement in writing of the reason for his opinion that proceedings should not be taken on the representation. That statement is as follows:—[His Lordship read the bishop's reply in *Allcroft's Case*, set out above.]

My Lords, I do not deny that, where some authority has been entrusted with a discretion which they decline to exercise, a writ of mandamus is an appropriate writ to remedy such neglect of duty, though I very much doubt whether the particular form of peremptory mandamus here awarded could ever be justified under this Act of Parliament. But it is obvious that, to justify any writ of mandamus, it must be made to appear that the Bishop has not exercised the jurisdiction which the statute has vested in him. Your Lordships have nothing to do with the question whether his judgment is right or wrong. Your Lordships would be exceeding your own jurisdiction if you were attempting to review a judgment, the jurisdiction to form which the Legislature has confided to the bishop and to the bishop alone.

I confess I cannot entertain a doubt that the Legislature, when using the language "after considering the whole circumstances of the case," intended to shew that the bishop's jurisdiction was not confined to the mere question whether there had been an infraction of the law. They intended to widen and enlarge the considerations which might weigh on the bishop's mind in determining the question whether the proceedings should go on.

It is perhaps not unworthy of remark that Lord Tenterden, in the case of *R.* v. *Mills and Another* (1), uses the very phrase to distinguish a wide and general discretion from that which is confined within narrow limits: "The justices of the county," said he, "into which the apprentice is to be bound, have a general discretion to consider the propriety of the binding. If they had only a particular discretion, and had not exercised it, the Court would have compelled them to do so; but here they have a general discretion, after inquiring into all the circumstances of the case, to determine on the fitness of the binding; and, as they have exercised it, there is no ground for a mandamus."

It is to my mind obvious that if the only discretion intended to be vested in the bishop was (to use Lord Tenterden's language) "a particular discretion," that is to say, whether the complaint was frivolous or that there had been really some infraction of the

(1) 2 B. & Ad. 578.

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law, it would have been very easy to find appropriate language to give effect to such a provision; but the language of the Legislature has, I think, been careful to shew that the bishop's discretion is not so fettered, and that the inquiry into all the circumstances of the case is one which may justly include considerations of the good to be done or the mischief involved in proceedings which, unless they obtain the bishop's sanction, cannot proceed.

Now the reason given by the bishop is said to shew that he has not considered all the circumstances of the case.

The statement in writing commences with the allegation that he has done so, and it is argued that this cannot be accurate, because he states that he has been influenced in deciding the main question principally by the case of *Phillpotts* v. *Boyd* (1). I am unable to follow the reasoning. The complaint is made of an image or sculptured subject representing Our Lord upon the cross. It has been in some cases argued that all such sculptured representations are unlawful. The bishop in effect says, I have considered that question, and *Phillpotts* v. *Boyd* (1) has decided that all such sculptured representations are not necessarily unlawful. He says, further on, I have considered the reredos now erected in St. Paul's, with a view to see whether there is in it anything which excepts it from the effect of the decision in *Phillpotts* v. *Boyd* (1); and he says that it appears to him that the difference between the two erections, in Exeter and in St. Paul's, is not such that it is possible to represent that the one offers serious temptation to idolatry and that the other does not. Rightly or wrongly, the bishop thinks that there is nothing of any importance in the reredos in question to distinguish it from that which was held to be lawful. My Lords, I only use that phrase "rightly or wrongly" to emphasise the fact that I am not presuming to enter into the question of the accuracy of the bishop's judgment, over which, as I have said, I have no jurisdiction.

The bishop then proceeds to shew that the litigation would be mischievous if persisted in; that no important question could be determined by its continuance, except one which is already covered by authority, and in his view litigation would be mis-

(1) L. R. 6 P. C. 435.

chievous both to the Church and to the religious life of the country.

My Lords, I am wholly unable to understand how, under such circumstances, it can be contended that the bishop has not considered all the circumstances of the case.

My Lords, with respect to the appeal of *Lighton* v. *Bishop of London*, I do not desire to add anything to the very lucid judgment of Hawkins, J. (1). And in truth it would be impossible to distinguish this case from the last, except that the bishop has in this appeal introduced into his reasons that an application was pending on an appeal from a former case. I am of opinion that that was one of the circumstances which the bishop was entitled to consider, and I am therefore of opinion that in this case, as in the other, the judgment of the Court of Appeal ought to be affirmed.

My Lords, I have to add that my noble and learned friend, Lord Hannen, has read my judgment, and desires to express his concurrence in it.

LORD BRAMWELL:—

My Lords, I am of opinion that this judgment should be affirmed. I cannot set any value on the words "whole circumstances of the case." I think the duty of the bishop would be the same as it is with those words if they were left out. Of course he is to consider the circumstances of the case, that is the whole, not a part only. Expressio eorum quæ tacitè insunt nihil operatur. However, I will bear the words in mind, the bishop is to consider the circumstances of the case. It was argued that he need not, that he might say, I will not consider them, and then he must transmit the representation and proceed as in the statute. There is absolutely no pretence for this contention; he would fail in his duty if he did not consider the case. He is only to transmit the case if he considers he ought. Suppose the words, instead of those used, had been, "If the bishop shall be of opinion that proceedings should be taken, he shall transmit, &c.," could there be a doubt that he would have to consider the case? There is indeed this difference, that if,

(1) [1891] 2 Q. B. 48.

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as the words stand, he cannot say that proceedings should not be taken, though he could not say affirmatively that they should be, he ought to transmit the representation. For he is not of opinion that he ought not. But that does not shew he need not consider the case. He is bound, it is his duty to do so.

Then it was said that there was something he had considered which he ought not to have considered, and something he had not considered which he ought to have, and so he had not considered the whole circumstances and them only. It seems to me that this is equivalent to saying that his opinion can be reviewed. I am clearly of opinion it cannot be. If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him. If, indeed, one can suppose the bishop, in such a case as this, refused to form an opinion by a point-blank refusal by such a statement as that he was of opinion proceedings should not be taken because they never should be, it may well be that he might be ordered to do his duty; that would be to consider the case as in the alternative branch of the rule nisi: not to transmit the representation as the rule commands him. How could he, in the case I have put, ask the parties whether they would submit to his directions? I have dealt with this argument, but the question does not arise, for the bishop has considered the circumstances of the case. He has not declined jurisdiction.

Then it is said why if his decisions cannot be reviewed is he to state his reasons? Lindley L.J. has given an excellent answer to this. It is that he may be under the necessity of forming a careful opinion, and one that will bear public examination. It is like the constitutional duty of judges who give their reasons for their judgment though there is no appeal; as in the case of your Lordships' House, and as formerly the judges of the superior Court gave on motions for new trials, for example, and other cases, and as they do now though there is no appeal. I believe if there had been such a law or rule in the 3 & 4 Vict. it would have been impossible that the question in *Julius* v. *Bishop of Oxford* (1) should have arisen.

It was asked what was the use or object of the Act of 1874 if

(1) 5 App. Cas. 214.

the bishop still has a discretion which cannot be reviewed. I have partly answered that argument already; but if anyone will refer to Lord Penzance's opinion in this House in that case of *Julius* v. *Bishop of Oxford* (1), he would see what might be the application to the bishop, who might make it, and other matters not provided for by 3 & 4 Vict. but provided for in the Act of 1874.

I have one more remark to make. Lord Cairns said that where there was a discretion, the opinion ought not to be criticised. Lord Cairns was a great lawyer and a consummate judge; but I differ with him unhesitatingly. I think that it is precisely where there is a discretion that the decision may be criticised. I thought, nay, I knew, that the law was being broken, and that there was a refusal to try and stop the illegality; that was wrong, and I said so. It is not a duty in a judge to do that, but it is often done, and with the goodwill and approval of the public, and I would do so in this case if I thought the bishop wrong; that is if I knew he was not, as in *Julius* v. *Bishop of Oxford* (1), interfering to stop what he knew was an illegality. But I do not; I have absolutely no opinion as to whether the Bishop of London in this case was right or wrong; I do not understand the matter; it has not been argued before us. I carefully abstain from any indication of an opinion on what may be called the merits as I think it beside the question before us.

These considerations apply to both the cases.

LORD HERSCHELL:—

My lords, the question which arises on each of these appeals is whether a mandamus ought to issue to the Bishop of London, commanding him to transmit a copy of the representation of the appellants to the Dean and Chapter of St. Paul's Cathedral. In the case in which Allcroft and others are the appellants, the writ was issued in accordance with the judgment of the majority of the judges who heard the case in the Queen's Bench Division; but the order for the issue of the writ was reversed by the Court of Appeal. The representation made to the bishop was that the dean and chapter had set up upon the reredos an image of Our

(1) 5 App. Cas. 214.

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Lord upon the cross in a conspicuous position, and also an image of the Virgin Mary with the Child in her arms. It was further represented that each of the images tended to encourage ideas and devotions of an unauthorized and superstitious kind, and that they were additions to the fabric ornaments or furniture of the cathedral church, and were decorations forbidden by law.

The bishop did not transmit the representation to the dean and chapter, but stated in writing the reasons for his opinion that proceedings should not be taken thereon. That it was within his province thus to act, under the provisions of the statute of 1874, could not be denied. The words of sect. 9 of the enactment are clear and unambiguous: "Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation (in which case he shall state in writing the reason for his opinion . . .), he shall, within twenty-one days after receiving the representation, transmit a copy thereof to the person complained of." It is obviously, therefore, a complete answer to the allegation that the bishop has committed a breach of duty in not transmitting the representation to the persons complained of, that he was of opinion, after considering the whole of the circumstances of the case, that proceedings ought not to be taken thereon.

But it is said that in the present case it appears from the reasons he has given, that the bishop's opinion was not formed "after considering the whole circumstances of the case," and that the condition which would alone justify his abstaining from transmitting the representation has thus not been complied with. The appellants insist that if the bishop considers less than the whole of the circumstances of the case, or anything beyond those circumstances, in forming his opinion, he is bound to transmit the representation and allow the proceedings to continue, even though he be, in fact, of opinion that proceedings ought not to be taken. And they say that, in the case before your Lordships, it is manifest that his opinion has been based upon considerations outside the circumstances of the case.

My Lords, when the statute prescribes that the bishop's opinion is to be formed after considering the whole of the cir-

cumstances of the case, I think it must mean that the bishop is to consider all the circumstances which appear to him, honestly exercising his judgment, to bear upon the particular case, and upon the question whether he ought in that case to prevent proceedings being taken. I dissent entirely from the view that it is for the Courts or your Lordships to determine what are the considerations which ought to govern the bishop's opinion. If a dozen persons told to consider all the circumstances of a given case, and to form their opinion thereon, were required to state what considerations they had taken into account, I do not believe that any two of them would precisely agree in their statement. Supposing a writ of mandamus were to issue in such a case as this, and that the bishop were to return that he was of opinion, after considering all the circumstances of the case, that proceedings should not be taken, the return would undoubtedly be good in point of law. It could only be met by a traverse of fact; and a jury would have, I presume, to determine, if the contention of the appellants be well founded, what in their opinion were the circumstances which the bishop ought to have taken into consideration. I am satisfied that this could not have been intended by the Legislature. It appears to me, I confess, clear, that the bishop has been empowered, even where the representation shews primâ facie a breach of the law, to say whether under the circumstances the proceedings ought to be permitted.

It was contended that inasmuch as the Legislature requires the bishop to state the reasons for his opinion, it was intended that these reasons should be reviewed to the extent at least of seeing that the bishop had considered all the circumstances of the case. I can draw no such conclusion. I think this obligation was imposed upon him, in order to secure, as I think it was calculated to do, a careful consideration of the circumstances of the case, and a conclusion for which in the bishop's opinion, he was able to disclose adequate reasons. The knowledge that his reasons would be made public and be the subject of criticism, would manifestly tend to prevent capricious and ill-considered action.

Arguments were addressed to your Lordships with a view of shewing the inconvenient and mischievous consequences

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which might flow from such a discretion if uncontrolled; but with this your Lordships have nothing to do; your duty is to administer the law according to its plain interpretation, and not to modify it, even though you should think that by so doing a more just and expedient result would be ensured. One can conceive cases, such as were suggested in argument, in which it might be shewn that the bishop had not exercised his discretion at all; if, for example, he determined never to permit proceedings under the Act, or laid down some arbitrary rule by which his action was to be governed, independent of the circumstances of the particular representations he might receive, in such an event the Courts might well interfere, just as they have done in similar circumstances in the case of justices who were empowered to exercise a discretion; but nothing of the sort was or could be suggested in the present case.

It is impossible to read the bishop's statement without seeing that he has honestly considered what appeared to him to be all the circumstances bearing on the question whether proceedings should be allowed to go on. This being so, it is not for your Lordships, on this application for a mandamus, to consider whether the bishop's reasons are good or bad; whether they ought or ought not to have led him to form the opinion he did. But I think it only right to say that the meaning of that part of his statement which refers to the case of *Phillpotts* v. *Boyd* (1), has, in my opinion, been misconceived by the appellants. That case did, I think, decide that the introduction of a figure of Our Lord in a reredos as part of a decoration, was not of itself necessarily and under all circumstances unlawful. And this is, I think, all that the bishop meant to say in the passage which was so much commented on at the Bar. I am of opinion that the judgment of the Court below was right and ought to be affirmed.

The judgment in the Court of Appeal in the case with which I have just dealt was delivered on the 17th of December 1889. Whilst the appeal therefrom was pending in this House, viz., on the 1st of May 1890, the appellants, Lighton and others, made a representation to the bishop under the provisions of the Public

(1) L. R. 6 P. C. 435.

Worship Regulation Act. This representation contained all the allegations set forth in the representation made by the appellants Allcroft and others, and alleged further that each of the two images had, in fact, encouraged ideas and devotions of an unauthorized, idolatrous, and superstitious kind, and had been, in fact, abused, and that unauthorized, idolatrous and superstitious regard and reverence had been, in fact, paid to each of them. The bishop stated that having considered the whole of the circumstances attending the representation, he was of opinion that proceedings should not be taken thereon, the reason given being that the questions raised were in substance identical with those raised in the case of the representation of Allcroft and others, and that the application by them for a mandamus was then pending in the House of Lords, and would shortly be ready for hearing.

A writ of mandamus was thereupon sought to compel the bishop to transmit a copy of the representation to the dean and chapter. The two learned judges in the Queen's Bench Division having differed in opinion, the order nisi for a mandamus was discharged. This judgment was affirmed by the Court of Appeal, and, I think, quite rightly. I have already expressed my opinion as to the bishop's functions and powers under the statute. I think there is no ground for saying that he has not acted within his jurisdiction and exercised the discretion vested in him. The fact that the appeal in the other case was pending in your Lordship's House at the time the representation was sent to the bishop, was, in my judgment, clearly a circumstance which he was justified in taking into consideration when he had to determine whether it was a case in which proceedings should be taken. I think this is apparent when it is remembered that if the representation had been transmitted, and proceedings had gone on in the first case, the second would have been absolutely useless, as every matter alleged by the second representation would have been relevant and capable of proof under the first. On the other hand, those who made the second representation had so framed it that even if the bishop were held to have acted within his powers in preventing proceedings on the first representation, they were in a position, if the bishop allowed this

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second representation to proceed, to abandon any attempt to prove the added allegations, and so to try the very case in which the bishop thought it was not right that proceedings should be taken.

I think that the judgment of the Court of Appeal ought in this case also to be affirmed.

Orders of the Court of Appeal of the 17*th December* 1889 *and the* 2*nd December* 1890 *affirmed, and appeals dismissed with costs.*

Lords' Journals, 20th July 1891.

Solicitors for appellants in both appeals: *Wainwright & Baillie.*

Solicitors for respondents in both appeals: *Lee, Bolton, & Lee.*

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1891, will be as follows:—

In the First Series,
[1891] 1 Ch. [1891] 2 Ch. [1891] 3 Ch.

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BANKRUPTCY—*Act of Bankruptcy—Notice of Intention to Suspend Payment—Bankruptcy Act* 1883 (46 & 47 *Vict. c.* 52) *s.* 4 *sub-s.* 1 (*h*).] A debtor sent to his creditors this letter:—"Being unable to meet my engagements as they fall due I invite your attendance at" (a specified place and time) "when I will submit a statement of my position for your consideration and decision":—*Held*, affirming the decision of the Court of Appeal (24 Q. B. D. 320) that the letter would naturally induce the creditors to believe that the debtor intended to suspend payment of his debts and therefore amounted to a notice that he was "about to suspend payment of his debts" within the meaning of the Bankruptcy Act 1883 sect. 4 sub-sect. 1 (*h*) and was therefore an act of bankruptcy. CROOK *v.* MORLEY - - - 316
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BILL OF EXCHANGE—*Acceptance, whether qualified—Negotiable Instrument—Words Prohibiting Transfer—Acceptance "in favour of Drawer only"—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 8, 19, 36.] If the acceptor of a bill of exchange desires to qualify his acceptance, he must do so on the face of the bill in clear and unequivocal terms, and so that any person taking the bill could not if he acted reasonably fail to understand that it was accepted subject to an expressed qualification.—A bill of exchange was drawn by L. Delobbel Flipo payable "to order Mr. L. Delobbel Flipo." The drawees stamped in printed letters across the face of the bill the words "Accepted payable at Alliance Bank London for" the drawees. Above these words the drawees wrote "In favour of Mr. L. Delobbel Flipo only. No. 28." The word "order" was struck out, but when or by whom did not appear. In an action on the bill by indorsees for value against acceptors:—*Held*, Lords Bramwell and Morris dissenting, that looking at the position and collocation of the words as they appeared on a facsimile of the bill, the words "in favour of Mr. L. Delobbel Flipo only" did not constitute a qualification of the acceptance, that the acceptance was a general acceptance of a negotiable bill, and that the action was maintainable.—*Held* by Lords Bramwell and Morris that the acceptance was not general but amounted to an acceptance payable to L. Delobbel Flipo only, and that the bill was not negotiable.—The decision of the Court of Appeal (25 Q. B. D. 343) affirmed. MEYER & Co. *v.* DECROIX, VERLEY ET CIE. - - - - - - 520

2. —— *Forgery of Name of Payee—Estoppel—Banker—Payee a "fictitious or non-existing person"—Knowledge of Acceptor—Fictitious Bill—Negligence—Bills of Exchange Act* 1882 (45 & 46 *Vict. c.* 61) *s.* 7 *sub-s.* 3.] The effect of sect. 7 sub-sect. 3 of the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61) is that a bill may be treated as payable to bearer where the person named as payee and to whose order the bill is made payable on the face of it is a real person but has not and never was intended by the drawer to have any right upon it or arising out of it; and this is so though the bill (so called) is not in reality a bill but is in fact a document in the form of a

BILL OF EXCHANGE—*continued.*

bill manufactured by a person who forges the signature of the named drawer, obtains by fraud the signature of the acceptor, forges the signature of the named payee, and presents the document for payment, both the named drawer and the named payee being entirely ignorant of the circumstances.—A series of documents so manufactured were made payable at the acceptor's bank, and the amounts were paid over the counter to the forger or his agent by the bank bonâ fide and in pursuance of letters of advice signed by the acceptor, whose signature thereto was fraudulently obtained by the forger, a clerk in the employment of the acceptor:—*Held*, that the bank was entitled to debit its customer, the acceptor, with the amounts, although paid to the forger or his agent and not to a bonâ fide holder of the documents for value or to any person who could sue the acceptor upon them:—By Lord Halsbury L.C. and by Lords Watson, Herschell, Macnaghten, and Morris, on the ground that the named payee was a fictitious or non-existing person within the meaning of the Bills of Exchange Act 1882 (sect. 7 sub-sect. 3) and that the documents might be treated as bills payable to bearer; also—By Lord Halsbury L.C. and by the Earl of Selborne and Lords Watson, and Macnaghten for reasons turning on the conduct of the parties.—The decisions of Charles J. (22 Q. B. D. 103) and of the Court of Appeal (23 Q. B. D. 243) reversed on the above grounds.—*Held*, contra by Lords Bramwell and Field that a banker cannot charge his customer with the amount of a bill paid to a person who had no right of action against the customer, the acceptor; that the payee was not fictitious or non-existent, and that the documents could not be treated as bills payable to bearer within sect. 7 sub-sect. 3 of the Act; that the conduct of the parties did not entitle the bank to debit the acceptor with the amounts; and that the decisions below ought to be affirmed. GOVERNOR AND COMPANY OF BANK OF ENGLAND *v.* VAGLIANO BROTHERS - - - 107

3. —— *Payment and Discharge—Cancellation without Authority—Liability of Agent employed to collect Bill.*] Where an agent is employed by the holder of a bill to receive payment of it from the acceptor, and receives payment from him clogged with a condition without assent to which the holder is not entitled to retain the money paid, the agent is not entitled to treat such conditional payment as if it were an absolute payment, and to cancel the bill as paid before he has received the assent to the condition.—The agent of a bank offered to try to obtain payment of a bill which had been protested for non-payment, and the holders accepted the offer. The acceptors offered to pay the bill and the protest charges on the condition that they should not be called upon to pay interest and expenses. The bank's agent communicated this condition to the holders, and without waiting for authority took payment of the bill and protest charges, marked the bill paid and delivered it to the acceptors, who deleted their names thereon. Thereafter the holders intimated their refusal to agree to the conditions on which payment had been made, refused to accept the sum tendered to them by the agent of

BILL OF EXCHANGE—*continued.*

the bank, and received back the bill cancelled. They then raised an action against the acceptors for the amount of the bill, with interest, and for the expenses of the action, and obtained decree, but the acceptors became bankrupt. The holders thereupon raised an action against the bank concluding for the amount of the bill, with interest, and for the expenses of their action against the acceptors:—*Held*, affirming the decision of the Court of Session (16 Ct. Sess. Cas. 4th Series (Rettie), 1081), that the bank was liable; but was entitled to an assignation of the rights of the holders against the drawers of the bill. BANK OF SCOTLAND *v.* DOMINION BANK (TORONTO) - **592**

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—— *Mackie* v. *Herbertson* (9 App. Cas. 303) approved - - - - **264**
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CEYLON, LAW OF—*Fiscal Sale—Ejectment.*] In an action of ejectment it appeared that the plaintiff had derived title by purchase from the mortgagor of the estate in question, and had covenanted with his vendor to pay all sums due on the mortgage; while the defendant had derived title and possession by a subsequent purchase at a fiscal sale obtained by the mortgagee in possession in proceedings to which the plaintiff was not a party:—*Held*, that whether the plaintiff was bound by the fiscal sale or not, he could not in justice or in law eject the defendant without at least paying to him the moneys due on the mortgage; and that, whether he was entitled to redeem or not, there being no prayer for relief of that character, it could not be decreed to him in this action. MURUGASER MARIMUTTU *v.* DE SOYSA - - - - - - - 69

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ECCLESIASTICAL LAW—*Church—Pew—Right appurtenant to House—Evidence—Long User and Acts of Ownership—Presumption of Legal Origin—Prescription—Faculty.*] A pew may be annexed to a dwelling-house in the parish by a faculty, and a faculty may be presumed upon evidence of exclusive possession and repair for a long period.—The owner of a freehold dwelling-house brought an action in respect of the disturbance of his possession of a pew in the parish church. There was evidence that for more than seventy years he and his predecessors in title had occupied the pew, kept it locked, and repaired it:—*Held*—upon the principle that a legal origin ought to be presumed if a legal origin be possible—that the grant of a faculty ought to be presumed, and that the action was maintainable; and that this was so though it appeared that 200 years ago the then lessee of the house (before he became the freeholder) first acquired possession of the pew in a manner which gave no legal title, the subsequent enjoyment not being more consistent with the illegal origin than with the presumption of a later faculty.—The decision of the Court of Appeal (23 Q. B. D. 48) affirmed. PHILIPPS *v.* HALLIDAY - - - 228

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2. —— *Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85), *ss.* 8, 9—*Bishop's Discretion to stop Proceedings on Representation*—"*After considering the whole circumstances of the case*"—*Refusal or Excess of Jurisdiction*—*Mandamus.*] By s. 9 of the Public Worship Regulation Act, 1874, it is provided that where a representation has under sect. 8 been sent to the bishop of the diocese complaining of an unlawful alteration in or addition to the fabric, ornaments or furniture of a cathedral church, the bishop shall take certain specified steps to have the matter of the complaint tried in one of the ways prescribed by the Act "unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, in which case he shall state in writing the reason for his opinion," &c.—A representation was sent to the Bishop of London complaining that the Dean and Chapter of St. Paul's Cathedral Church had set up on a reredos in that church images of Our Lord and of the Virgin and Child and that the images tended to encourage ideas and devotions of an unauthorized and superstitious kind and were unlawful. The bishop replied that having in pursuance of the Act considered the whole circumstances attending the representation he was of opinion that proceedings should not be taken for reasons which he stated at length, the reasons being based upon his view of the decision in *Phillpotts* v. *Boyd* (Law Rep. 6 P. C. 435) as affecting the present case and upon the mischievous results which such litigation would in his opinion cause. On an application for a mandamus to compel the bishop to proceed according to the Act, upon the ground that the bishop's reasons shewed that he had not considered the whole circumstances of the case, and also had considered matters which were not circumstances of the case, the Court of Appeal held (24 Q. B. D. 213) that there did not appear to be any ground for either contention, and that a mandamus ought not to issue.—While the appeal from that decision was pending in this House, a second representation was made to the bishop with regard to the same images and in similar terms, with the additional allegation that the images had in fact encouraged idolatrous and superstitious ideas and devotion, and that idolatrous and superstitious reverence had been paid to them. The bishop replied that having considered the whole circumstances attending the representation, he was of opinion that proceedings should not be taken for the reason that the questions raised in the case were in substance identical with those raised in the first case, and that the appeal in the first case was then pending in this House. A similar application for a mandamus having been made, the Court of Appeal, affirming the decision of Hawkins, J. ([1891] 2 Q. B. 48), held that there was no ground for the mandamus.—*Held*, affirming the decisions of the Court of Appeal in each case, that the bishop had acted within his jurisdiction and exercised the discretion vested in him; that whether the reasons he gave were good or bad, the bishop having considered all the circumstances which appeared to him, honestly exercising his judgment to bear upon the particular case, his reasons could not be reviewed, and that there was no ground for a mandamus. ALLCROFT *v.* LORD BISHOP OF LONDON. LIGHTON *v.* LORD BISHOP OF LONDON - - - - - 666

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EXECUTOR—*Administration—Assets of Testator—Power of Executors to carry on Business—Right of Executors to Indemnity—Rights of Creditors of Testator and subsequent Creditors of Executors.*] A testator's business was carried on for about three years by his executors after his death in accordance with the provisions of the will and with the assent of the testator's creditors, in the interest of the creditors as well as of the beneficiaries, and was properly carried on:—*Held*, that the executors were entitled (in priority to claims by the testator's creditors) to be indemnified out of the testator's estate against the liabilities which they had properly incurred, and that the indemnity was not limited to that portion of the assets which had come into existence or changed its form since the testator's death.—The decision of the Court of Appeal (40 Ch. D. 536) varied accordingly. DOWSE *v.* GORTON - - 190

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FISHERY, *Several, in Tidal Waters—Foreshore of the Sea—Ownership of Soil—Evidence—Presumption—Grant by Crown of Several Fishery.*] Primâ facie the Crown is entitled to every part of the foreshore of the sea between high and low-water-mark; but proof of the ownership of a several fishery over part of the foreshore raises a presumption against the Crown that the freehold of the soil of that part of the foreshore is in the owner of the several fishery. THE ATTORNEY-GENERAL *v.* EMERSON - - - 649

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INCOME TAX—*Revenue—Allowances—"Charitable Purposes"—Certificate—Procedure—Mandamus to Commissioners—5 & 6 Vict. c. 35, Sched. A, s. 61, No. VI., s. 62.*] By 5 & 6 Vict. c. 35, s. 61, No. VI., allowances in respect of the income tax imposed by Sched. A are to be granted by the Commissioners for Special Purposes of the Income Tax on (inter alia) the rents and profits of lands, tenements, hereditaments, or heritages, vested in trustees for charitable purposes, so far as the same are applied to charitable purposes.—In a case where an allowance which ought to be granted is refused mandamus lies to the Commissioners commanding them to grant the allowance and to give a certificate of the allowance with an order for the payment thereof.—Lands in England were conveyed by deed in 1813 to trustees upon trust after payment of costs and outgoings to apply two-fourths of the rents and profits for the general purposes of maintaining, supporting and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, commonly known as the Moravian Church; and to apply the remaining two-fourths for purposes which were admitted in argument in this House on behalf of the Crown to be charitable within the meaning of the Act. On a claim for the allowance in respect of the whole trust:—*Held*, Lord Halsbury L.C. and Lord Bramwell dissenting, that the words "charitable purposes" in the Act were not restricted to the meaning of relief from poverty, but must be construed according to the legal and technical meaning given to those words by English Law and by legislation applicable to Scotland and Ireland as well as England, and that the allowance ought to be granted.—*Held*, by Lord Halsbury L.C. and Lord Bramwell, approving the decision in *Baird's Trustees* v. *Lord Advocate* (15 Sess. Cas. 4th Series, 682), that the technical construction of the words "charitable purposes" imputed to English Law had never been adopted in Scotch Law; that in a taxing Act applicable to the whole of the United Kingdom the words could not receive that construction; and that since the trust for missions among heathen nations contemplated purposes having no relation to the relief of poverty the purposes were not "charitable" within the meaning of the Income Tax Act, and that the allowance ought not to be granted in respect of that portion of the trust.—The decision of the Court of Appeal (22 Q. B. D. 296) affirmed.—*Baird's Trustees* v. *Lord Advocate* (15 Sess. Cas. 4th Series, 682) disapproved. COMMISSIONERS FOR SPECIAL PURPOSES OF INCOME TAX *v.* PEMSEL [531

INCOME TAX—*continued.*

INFANT—*Practice—Appeals from Divisional Court—Habeas Corpus—Custody of Infant—Illegitimate Child—Guardianship—Rights of Mother of Illegitimate Child.*] An appeal lies from an order of the Queen's Bench Division directing the issue of a writ of habeas corpus to bring before the Court an infant in order to determine who is to have the custody of and control over such infant.—In determining who is to have the custody of and control over an illegitimate child the Court in exercising its jurisdiction with a view to the benefit of the child will primarily consider the wishes of the mother.—The decision of the Court of Appeal ([1891] 1 Q. B. 194) affirmed.—*Reg.* v. *Nash* (10 Q. B. D. 454) approved.—By Lords Herschell and Field: The authorities do not establish the proposition that the legal rights of the mother of an illegitimate child as to its custody are the same as those of the father of a legitimate child. BARNARDO *v.* MCHUGH - - - - - 388

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INN—*Licensed Persons—Public-house—Renewal of License—Discretion—Magistrates—Licensing Acts*, 1828, 1872, 1874 (9 *Geo.* 4, *c.* 61, *s.* 1, 35 & 36 *Vict. c* 94, *s.* 42, 37 & 38 *Vict. c.* 49, *s.* 26).] On the hearing of an application for the renewal of a license for the sale of intoxicating liquors under the Licensing Acts 1828, 1872, and 1874, the licensing justices have a discretion to refuse the renewal on the ground of the remoteness from police supervision and the character and necessities of the neighbourhood.—The decision of the Court of Appeal (22 Q. B. D. 239), affirmed.—SHARP *v.* WAKEFIELD - - - 173

INSURANCE, MARINE—*Collision Clause—Vessel under Tow—Collision with Tug—Construction of Policy.*] By a policy of marine insurance the underwriters insured the ship *Niobe* from the Clyde (in tow) to Cardiff $\frac{\text{and}}{\text{or}}$ Penarth while there and thence to Singapore, and while in port for thirty days after arrival; and agreed "if the ship hereby insured shall come into collision with any other ship or vessel and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, any sum or sums of money," &c., to pay the assured a certain proportion of the sum so paid.—While the *Niobe* was being towed to Cardiff her tug came into collision with and sank another vessel, whose owners recovered damages both from the *Niobe* and the tug.—In an action by the owners of the *Niobe* upon the policy against one of the underwriters for payment of his proportion of the sum paid by such owners on account of the collision, the underwriter pleaded that under the policy he was only liable for damage arising from collision with the *Niobe*:—*Held*, affirming the decision of the Court

INSURANCE, MARINE—*continued.*
of Session (17 Court Sess. Cas. 4th Series (Rettie) 1016) (Lord Bramwell dissenting), that the collision of the tug with the damaged vessel must be taken to have been a collision of the Niobe with another vessel within the meaning of the policy, and that the underwriters were liable. McGowan *v.* Baine. The "Niobe" - 401

2. —— *Open Policy—Construction—Declaration of Goods by Insured—Onus Probandi.*] Where payment of a risk is resisted by insurers on the ground of misrepresentation, the onus is on them to prove very clearly that such misrepresentation has been made.—Where an open policy was granted on goods shipped from Melbourne to London per one set of specified steamers to Sydney, and thence to London per another set, covering risk while in a specified factory at Sydney, "declarations to be made within forty-eight hours after departure of steamer from Sydney":—*Held*, that according to the true construction of this contract two declarations must be made by the insured, one as incident to every contract of an open policy, for the purpose of identifying the shipments at Melbourne to which the policy was to attach and necessary by law to make the policy operative; the other, under the express terms of the above contract, giving particulars relating to such goods as had been already brought within the policy, by a previous declaration apt for that purpose, and had since been actually shipped for London. —*Semble:* Though there is no positive law in New South Wales requiring contracts of marine insurance to be in writing, yet the general authority given to the agent of an insurance company must be to make contracts in the ordinary way, and that is by writing. Davies *v.* National Fire and Marine Insurance Company of New Zealand - - - - - 485

JURISDICTION—Arbitration—Scotch law 31
See Scotch Law. 1.

—— Bankruptcy—Supreme Court of Lagos 460
See Lagos, Law of.

—— Criminal — New South Wales — Offences committed without the colony - 455
See New South Wales, Law of. 1.

LAGOS, LAW OF—*Bankruptcy—Land of Bankrupt in Lagos vests in trustee under Act of* 1869—*Jurisdiction of Supreme Court.*] *Held*, that the Supreme Court of the Gold Coast Colony had no bankruptcy jurisdiction in 1877, and, therefore, could not act as an auxiliary to the English Court under sect. 74 of the Bankruptcy Act, 1869. —*Held*, further, that the English Bankruptcy Act of 1869 applies to all Her Majesty's dominions, and therefore that an adjudication under that Act operates to vest in the trustee in bankruptcy the bankrupt's title to real estate situate in Lagos, subject to any requirements prescribed by the local law as to the conditions necessary to effect a transfer of real estate there situate.—Some of the bankrupt's land having been taken under the Public Lands Ordinance, 1876, *held*, that costs were rightly given under sect. 8 of the Petitions of Right Ordinance, 1877, against the Government who had resisted payment of the price to the appellants. Callender, Sykes & Co. *v.* Colonial Secretary of Lagos and Davies. Williams *v.* Davies - - - - 460

LAGOS, LAW OF—*continued.*

LAND TAX—Law of Victoria - - 446
See Victoria, Law of. 3.

LIBEL—*Privileged Communication — Onus probandi—Misdirection.*] No distinction can be drawn between one class of privileged communications and another: they all imply that the occasion rebuts the inference that the defendant is actuated by mala fides, and casts the burden of proving malice on the plaintiff.—Where the jury were told that the existence of privilege was contingent upon whether in their opinion the defendant honestly believed his volunteered communication to be true, and that the burden of proof to that effect was upon him, *held*, that this was misdirection, and that a verdict for the plaintiff must be set aside. Jenoure *v.* Delmege - - 73

LICENCE—Public-house—Renewal - 173
See Inn.

LUNATIC—Scotch law—Curator bonis - 616
See Scotch Law. 4.

MANDAMUS—Public Worship Act—Discretion of bishop - - - - 666
See Ecclesiastical Law. 2.

MASTER AND SERVANT—Negligence
See Negligence. 1, 2. [325, 371

MAXIM OF LAW—"Volenti non fit injuria"
See Negligence. 2. [325

MINE—Compensation for—Waterworks - 81
See Waterworks Company.

MISREPRESENTATION—Policy of marine insurance—Onus probandi - - 485
See Insurance, Marine. 2.

NEGLIGENCE—*Master and Servant — Common Employment — Contractor and Sub-contractor*] In an action to recover damages for injury caused by the negligence of the defendant's servant, the defence of common employment is not applicable unless the injured person and the servant whose negligence caused the injury were not only engaged in a common employment but were in the service of a common master.—Builders contracted to build a block of houses, under a specification prepared by the owners' architect, certain fireproof portions of the houses to be executed by the respondents, who were iron-founders. The respondents contracted with the architect to do their portion of the work, and had no contract with the builders, and were not under their direction or control. While the respondents were carrying out their contract workmen employed by them in raising concrete to the upper storey of the building negligently let a bucket fall on the appellant, who was working in the lower storey in the employment of the builders. In respect of the injury thus caused the appellant brought an action against the respondents:—*Held*, reversing the decision of the Court of Appeal (23 Q. B. D. 508), that since the relation of master and servant did not exist between the respondents and the

NEGLIGENCE—*continued.*
appellant the doctrine of collaborateur did not apply and the action was maintainable.—*Wiggett* v. *Fox* (11 Ex. 832) commented on.—*Woodhead* v. *Gartness Mineral Company* (4 Sc. Sess. Cas. 4th Series, 469) and *Maguire* v. *Russell* (12 Sc. Sess. Cas. 4th Series, 1071) disapproved.—Lord Cairns' observations in *Wilson* v. *Merry* (Law Rep. 1 H. L., Sc. 331, 332) explained. JOHNSON *v.* LINDSAY & Co. - - - - 371

2. —— *Master and Servant—Defect in System—Risk voluntarily incurred—Maxim "Volenti non fit Injuria" — Employers Liability Act* 1880 (43 *&* 44 *Vict. c.* 42)—*Practice—Appeal from County Court—Point not raised at Trial—Condition Precedent—County Courts Act* 1888 (51 *&* 52 *Vict. c.* 43) s. 120.] When a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department over which he has no control—the danger being created or enhanced by the negligence of the employer—the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to shew that he has undertaken the risk so as to make the maxim "Volenti non fit injuria" applicable in case of injury. The question whether he has so undertaken the risk is one of fact and not of law. And this is so both at common law and in cases arising under the Employers Liability Act 1880.—The plaintiff was employed by railway contractors to drill holes in a rock cutting near a crane worked by men in the employ of the contractors. The crane lifted stones and at times swung them over the plaintiff's head without warning. The plaintiff was fully aware of the danger to which he was exposed by thus working near the crane without any warning being given, and had been thus employed for months. A stone having fallen from the crane and injured the plaintiff, he sued his employers in the county court under the Employers Liability Act 1880. The jury found (1) that the machinery for lifting the stone, taken as a whole, was not reasonably fit for the purpose for which it was applied; (2) that the omission to supply special means of warning was a defect in the ways, works, machinery and plant; (3) that the employers (or some person engaged by them to look after the condition of the works, &c.) were guilty of negligence in not remedying the defect; (4) that the plaintiff was not guilty of contributory negligence; (5) that he did not voluntarily undertake a risky employment with a knowledge of its risks; and returned a verdict for the plaintiff for damages. Application having been made to enter judgment for the defendants on the ground that the case ought not to have gone to the jury, the plaintiff having admitted that he knew of the risk and voluntarily incurred it:—*Held*, reversing the decision of the Court of Appeal (Lord Bramwell dissenting), that the mere fact that the plaintiff undertook and continued in the employment with full knowledge and understanding of the danger arising from the systematic neglect to give warning did not preclude him from recovering; that the evidence would justify a finding that the plaintiff did not voluntarily undertake the risk of injury; that

NEGLIGENCE—*continued.*
the maxim "Volenti non fit injuria" did not apply; and that the action was maintainable:—*Held*, contrà by Lord Bramwell, that there was no evidence to justify the 5th finding of the jury; that the plaintiff having voluntarily undertaken the work with knowledge of the risk the maxim "Volenti non fit injuria" applied; and that the action was not maintainable.—*Sword* v. *Cameron* (1 Sc. Sess. Cas. 2nd Series, 493) approved.—*Thomas* v. *Quartermaine* (18 Q. B. D. 685) commented on.—Under the provisions of sect. 120 and the following clauses of the County Courts Act 1888 (51 & 52 Vict. c. 43) there is no right of appeal from a county court except upon a question of law raised and submitted to the county court judge at the trial.—*Clarkson* v. *Musgrave* (9 Q. B. D. 386) approved. SMITH *v.* BAKER & SONS - 325

3. —— *Ship — Harbour — Dock — Harbour-master, Authority of to bind Owners—Permissive use of Lock for grounding.*] A ship entered a dock to load. While crossing the dock her propeller got foul of a rope so that the shaft was jammed and the engines could not be worked. There being no dry dock the ship was with the assent of the harbour-master put into a lock which served as the entrance to the dock in order that the water might be drawn off and the propeller cleared, the harbour-master representing to the captain of the ship that the bottom of the lock was level and that the ship might safely ground there. When the ship took the ground, being then heavily laden, she sustained serious injury owing to the existence of a sill which projected several inches above the level of the bottom across the middle of the lock. The dock was regulated by statute which empowered the owners to take tolls for ships entering the dock, and required persons in command of vessels within the dock to place them as the harbour-master should direct, under penalties. Vessels had on previous occasions been grounded in the lock under similar circumstances. The owners of the ship having brought an action against the dock owners to recover damages for the injury to the ship:—*Held*, reversing the decision of the Court of Appeal (Lords Bramwell and Morris dissenting), that the harbour-master in informing the captain of the ship where she might safely ground and in permitting the ship to use the lock for the above purpose was acting within the scope of his authority; that he was guilty of a breach of duty in giving that permission and making the representations he did, when he knew—or ought to have known—of the existence of the sill; and that the dock owners were liable to the owners of the ship for damages for the injury:—*Held*, by Lords Bramwell and Morris, that the harbour-master had authority to permit the ship to use the lock for the purpose for which she used it, but that he had no authority to undertake that the lock was safe or to undertake any duty of care; nor did he in fact so undertake; that the captain took the ship into the lock not of right but only under a license and at his own risk, the use of the lock being for an abnormal and extraordinary purpose; and that the dock owners were not liable. OWNERS OF THE "APOLLO" *v.* PORT TALBOT COMPANY. THE "APOLLO" - - - - 499

NEGLIGENCE—*continued.*
—— Contributory—Collision - - 259
See SHIP. 3.

—— Death of illegitimate child—Reparation to parents - - - - 412
See SCOTCH LAW. 5.

—— Wharfinger—Obstruction in bed of river 11
See SHIP. 5.

NEGOTIABLE INSTRUMENT — Acceptance whether qualified - - - 520
See BILL OF EXCHANGE. 1.

NEW SOUTH WALES, LAW OF—*Criminal Law Amendment Act*, 1883, *s.* 54—*Criminal Jurisdiction — Offences committed without the Colony.*] Sect. 54 of the Criminal Law Amendment Act, 1883 (46 Vict. No. 17), enacts that, "whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years":—*Held*, that these words must be intended to apply to those actually within the jurisdiction of the Legislature, and consequently that there was no jurisdiction in the Colony to try the appellant for the offence of bigamy alleged to have been committed in the United States of America. MACLEOD *v.* ATTORNEY-GENERAL FOR NEW SOUTH WALES 455

2. —— *Crown Lands Alienation Act*, 1861—*Conditional Purchase in the Name of an Infant—Non-compliance with the Conditions of the Act.*] The respondent (an infant of six years) having been entered by the appellant, under the Crown Lands Alienation Act, 1861, as a conditional purchaser of land selected by the appellant as forming part of his own run, the latter paid the deposit money, made the requisite statutory improvements at his own expense, continued to occupy the same as part of his own run, and paid the balance of the purchase-money.—In an action by the appellant after the respondent came of age, to have the latter declared a trustee for him, and for an order of transfer:—*Held*, (*a*) that the respondent was not a statutory purchaser, since the conditions of the Act were not complied with by him personally, nor by another for his benefit.—*O'Shanassay* v. *Joachim* (1 App. Cas. 82) distinguished. —(*b*) that the appellant was not a statutory purchaser, since his proceedings, being under cover of the respondent's name with a view to create in him a right subject to a resulting trust, were not a compliance with the conditions of the Act. —*Barton* v. *Muir* (Law Rep. 6 P. C. 134) distinguished. TOOTH *v.* POWER - - - 284

3. —— *Descent of Land—Act* 26 *Vict. No.* 20, *ss.* 1, 2—*Construction—Devolution of Wife's Realty after Husband's Tenancy by the curtesy expired.*] The effect of New South Wales Act, 26 Vict. No. 20, sects. 1, 2, is to give all land which previously descended to the heir to the next of kin of the predecessor:—*Held*, that the proviso which follows to the effect that "nothing herein contained shall give to any husband on the death of his wife intestate any greater interest in the real estate of his wife, or in the produce thereof upon sale than a tenancy for life by the curtesy," does not operate to prevent such real estate after the death of the husband descending under the Act to the wife's next of kin instead of to her heir-at-law. PLOMLEY *v.* SHEPHERD - - 244

NEW SOUTH WALES, LAW OF—*continued.*

4. —— *Stamp Duties Acts—Probate—Locality of Debt—Probate Duty.*] In order that an asset may be liable to probate duty under the Stamp Duties Acts it must be such as the grant of probate confers the right to administer, and therefore one which exists within the local area of the probate jurisdiction.—*Blackwood* v. *The Queen* (8 App. Cas. 82) followed.—Though a debt has no absolute local existence, yet it is a well-settled rule that it possesses an attribute of locality—a simple contract debt being within the area of the local jurisdiction within which the debtor for the time being resides, the locality of a specialty debt being where the specialty is found at the time of the creditor's death.—Where a deed contained an express covenant to retire and pay promissory notes, and a proviso that the simple contract should not merge in the specialty:—*Held*, that even if the remedies by simple contract to a certain extent were preserved, still there was but one debt, and that had become a debt by specialty. —*Price* v. *Moulton* (10 C. B. 561) considered. COMMISSIONER OF STAMPS *v.* HOPE - - 476

—— Marine insurance—Contract in writing 485
See INSURANCE, MARINE. 2.

NEW ZEALAND, LAW OF—*Will of Maori—Probate—Onus Probandi.*] *Held*, that strict proof must be given of a will which is informal, signed by mark instead of the usual subscription in full of the testator, and has been obtained from him by one of the propounders having a substantial interest in its provisions and witnessed by two of her relations. Such a will is not invalid; but the onus probandi may be increased by circumstances, and the presumption may even be conclusive against the validity of the instrument.—The rules which govern Courts of Probate must not be relaxed in the case of alleged testamentary papers executed by Maoris on their death-beds. DONNELLY *v.* BROUGHTON [435

NOVA SCOTIA, LAW OF—*Wills—Codicils—Revocation—Revival.*] Where by a codicil dated the 21st of July, 1882, expressed to be a codicil to his will of the 17th of July, 1880, the testator confirmed the said will, and it appeared that the said will consisted not merely of the document of the 17th of July, 1880, but also of an intermediate codicil revoking a particular bequest therein:—*Held*, that though a reference simply to the date of the earlier document was not sufficient in itself to restrict the confirmation to that particular document, yet other words and surrounding circumstances could and did convey such an intention with reasonable certainty, and accordingly the will of the 17th of July after confirmation was no longer affected by the partial revocation made by the intermediate codicil. MCLEOD *v.* MCNAB - - - - 471

ONUS PROBANDI — Libel—Privileged communication - - - - 73
See LIBEL.

PATENT—*Prolongation—Expiration of previous Foreign Patent—Practice—Relaxation of Rule No. 1 with regard to Notices.*] By sect. 25 of 15 & 16 Vict. c. 83, an English patent ceases at the expiration of a prior foreign patent for the same invention. — Sect. 113, sub-sect. 1 of 46 & 47 Vict. c. 57, saves to a patentee existing at the date of the Act his right to a confirmation under 5 & 6 Will. 4, c. 83, s. 2, subject however to the above qualification.—The provisions of rule 1 relating to confirmation relaxed under special circumstances.—Petition for prolongation refused as inadmissible either under the Act of 1883 or the earlier law. *In re* JABLOCHKOFF'S PATENT - - - - - 293

2. —— *Prolongation — Insufficiency of Accounts.*] Where the accounts filed by a patentee shewed not the result of the books, but the accountant's correction of them, and where it also appeared that the books themselves had been kept in such a way that without a very long, minute, and laborious investigation it was impossible to say whether he had been adequately remunerated or not:—*Held*, that a petition for prolongation must be dismissed. LAKE'S PATENT - - - - - 240

3. —— *Prolongation—Non-user of Invention —Presumption of Non-utility rebutted.*] Where an invention has not been brought into use during the term of the letters patent, but such non-user is satisfactorily accounted for, and the invention is one of great merit, an extension may be granted. SOUTHBY'S PATENT - 432

4. —— *Prolongation — Practice — Time for filing Petition.*] Where a petition for prolongation has not been presented within six months before the patent, which had been granted in 1877, had expired:—*Held*, that it is excluded both by 5 & 6 Will. 4, c. 83, and also by 2 & 3 Vict. c. 67.—*Brandon's Patent* (9 App. Cas. 589) and *Jablochkoff's Patent* (ante, p. 293), distinguished. MARSHALL'S PATENT - - 430

PAYMENT — Bill of exchange — Cancellation without authority—Liability of agent
See BILL OF EXCHANGE. 3. [592

PEW—Ownership - - - - 228
See ECCLESIASTICAL LAW. 1.

PRACTICE—PRIVY COUNCIL—*Bail—Rules of* 1865 *and* 1883:—*Held*, that Rule No. 15 of 1865 may be dispensed with in a proper case. HUNTER *v.* SS. "HESKETH" - - - - 628

PRACTICE — SUPREME COURT — *Extension of Time to Appeal—Judicature Act*, 1876 (39 & 40 *Vict. c.* 59), *s.* 3—*Order* LVIII., *r.* 15.] No appeal lies to this House from a refusal of the Court of Appeal to grant special leave to appeal from a judgment of the High Court in a case where the time limited (by Order LVIII. rule 15) for appealing has expired. Such a refusal is not an order or judgment of the Court of Appeal within the meaning of sect. 3 of the Appellate Jurisdiction Act, 1876. LANE *v.* ESDAILE - 210

PRACTICE—Appeal from county court - 325
See NEGLIGENCE. 2.

—— Appeal—Habeas corpus - - 388
See INFANT.

PRACTICE—*continued.*

—— Pleading—Contributory negligence 259
See SHIP. 3.

—— Pleading—Law of Trinidad - - 450
See TRINIDAD, LAW OF.

—— Prolongation of patent - - 430
See PATENT. 4.

—— Scotch law—Lunacy - - - 616
See SCOTCH LAW. 4.

PRINCIPAL AND AGENT—Bill of Exchange—Cancellation without authority - 592
See BILL OF EXCHANGE. 3.

PROBATE—Will of Maori - - - 435
See NEW ZEALAND, LAW OF.

PROBATE DUTY—New South Wales - 476
See NEW SOUTH WALES, LAW OF. 4.

PROLONGATION OF PATENT - 240, 293, [430, 432
See PATENT. 1, 2, 3, 4.

REVENUE—Income Tax - - - 531
See INCOME TAX.

—— Probate duty—Law of New South Wales [476
See NEW SOUTH WALES, LAW OF. 4.

REVOCATION—Will—Codicil—Confirmation of Will - - - - - 471
See NOVA SCOTIA, LAW OF.

RIVER—Obstruction in—Liability of Wharfagee
See SHIP. 5. [11

RULES OF PRIVY COUNCIL, 1865, r. 15 - 628
See PRACTICE—PRIVY COUNCIL.

RULES OF SUPREME COURT, Order LVIII., r. 15
See PRACTICE—SUPREME COURT. [210

SAILING REGULATIONS - - - 310
See SHIP. 4.

SCOTCH LAW—*Arbitration—Reduction of Decree Arbitral—Jurisdiction of Arbitrator—Scotch Act of Regulations*, 1695, *s.* 25—*Constructive Corruption of Arbitrator.*] The Act of Regulations of 1695, which provides that "for the cutting off of groundless processes in time coming the lords of session sustain no reduction of any decreet arbitral pronounced on a prescribed submission upon any cause or reason whatsoever unless that of corruption, bribery, or falsehood to be alleged against the judges arbitrators" was intended to put an end to the practice which had previously obtained of reviewing awards upon the merits; but not to prevent the courts from setting aside an award where the arbitrator has exceeded his jurisdiction, or has disregarded any one of the expressed conditions of the submission, or the conditions implied by law, or has been guilty of misconduct in the course of the reference or in the making of the award.—There is nothing to warrant the conclusion that the word "corruption" in the above Act of Regulations should receive any other than its ordinary construction, and it cannot be taken to include irregular conduct on the part of the arbitrator with no suggestion of any corrupt motive.—The appellants contracted with the respondents, a railway company, to construct two sections of a railway: the second section to be ready on the 30th of September, 1884, "or on

SCOTCH LAW—*continued.*

or before such respective days thereafter as might be respectively fixed by the arbiter after named," the appellants to be liable in all damages occasioned by their failing to complete the works, and as compensation for loss of profits should the sections not be in a state to be open for traffic by the times stipulated, the appellants to be bound to pay the respondents £20 as the liquidate and agreed on compensation for every day which the sections should remain unfinished. The contract contained a clause referring to an arbitrator "all disputes and differences which should arise between the parties in reference to the contract or in regard to the construction of it, or of the specifications, conditions, and schedules." The specifications and conditions for the construction of the second section contained a clause to the effect that a specified portion of the embankment of the line should not be formed until the contractor for the bridge over the river Spey had completed the works in connection with the erection of the east abutment of the bridge, &c. The line was not completed till the 1st of May, 1886.—On application to the arbitrator after the time specified for the completion of the works as to the settlement of their accounts under the contracts, he found the appellants entitled to an extension of six months as regarded the completion of the second part of the works, but that they were liable in penalties for each day's delay from the 30th of March, 1885, to the 1st of May, 1886. It appeared that the appellants did not obtain access to the ground on which the embankment was to be formed till February, 1886:—*Held*, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series (Rettie) 843), that the award was good on the face of it, and there was no evidence that the arbitrator had awarded damages in respect of delay caused by the bridge not being completed.—Opinion expressed in *Alexander* v. *Bridge of Allan Water Co.* as to "constructive" corruption (7 Court Sess. Cas. 3rd Series (Macph.), at p. 498), disapproved. ADAMS *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY - - - - - - **31**

2. —— *Bankruptcy—Casus improvisus—Nobile Officium—Discharge of both Trustee and Bankrupt—Re-appointment of a Trustee—Bankruptcy (Scotland) Act*, 1856 (19 & 20 *Vict. c.* 79), *ss.* 102, 103, 132, 152, 155—*Competency.*] The Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), s. 152, provides for the discharge of a trustee in bankruptcy "after a final division of the funds," but contains no express provision for the appointment of a new trustee after such discharge has been granted by the Court.—Certain creditors upon a sequestrated estate on which both the trustee and bankrupt had been discharged, the latter without composition, presented to the Court of Session a petition for a remit to the Lord Ordinary on the bills to appoint a meeting of creditors for the election of a new trustee, averring that there were funds belonging to the sequestrated estate which had not been recovered, and that the petitioners had not been paid their debts in full. There was no concealment or fraud alleged. The bankrupt opposed the petition and claimed the funds. The Court

SCOTCH LAW—*continued.*

of Session made the remit as prayed:—*Held*, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series (Rettie) 100), that the Court of Session had jurisdiction to make the order, it being merely machinery for giving effect to the rights of the creditors under the Act, and according to the settled practice of that Court. WHYTE *v.* NORTHERN HERITABLE SECURITIES INVESTMENT COMPANY - - - - **608**

3. —— *Husband and Wife—Scotch Domicil—Sale of English Heritage belonging to Wife—Surrogatum—Donation inter virum et uxorem—*3 & 4 *Will.* 4, *c.* 74, *ss.* 77, 78, 80, 84.] The wife of a domiciled Scotsman, with her husband's concurrence, sold estates situate in England, which belonged to her at the time of her marriage. She acknowledged the conveyance in the manner prescribed by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), declaring at the same time that she intended to give up her interest in the estates without having any provision made for her in lieu thereof. Her husband received the price. There was no marriage contract. The husband and wife afterwards separated by mutual consent. Subsequently the wife executed a deed of revocation of all donations and provisions made by her in her husband's favour. She then brought an action for a declaration that the price of the estates in his hands was either a surrogatum for her heritage, and not subject to the jus mariti, or else a donation to him which she had validly revoked:—*Held*, reversing the decision of the Court of Session (16 Court Sess. Cas. 4th Series (Rettie) 876), that having regard to the English law of real property, the price was not a surrogatum for heritage belonging solely to the wife, for both spouses possessed undetermined interests in it, and her assent to his receiving the entire price could not be regarded as a donation inter virum et uxorem. WELCH *v.* TENNENT **639**

4. —— *Lunatic—Practice—Insanity—Curator bonis—Insane Delusions—Opposition of Alleged Incapax—Discretion in the Court to refuse Inquiry before a Jury—Act Sederunt*, 1730—20 & 21 *Vict. c.* 71—31 & 32 *Vict. c.* 100, *s.* 101.] The wife of a man who was detained in a lunatic asylum presented a petition for the appointment of a curator bonis to her husband. He opposed the petition, maintaining that he ought not to be superseded in the management of his affairs until a cognition had issued in order to have the finding of a jury on the case. He did not dispute the propriety of his being in an asylum, but stated that such delusions as he might labour under in no way interfered with his business capacity.—The Court of Session, on a consideration of the medical reports obtained by the petitioner, by the alleged lunatic, and by the Lord Ordinary, granted the petition and appointed a curator bonis. On appeal by the alleged lunatic:—*Held*, affirming the decision of the Court of Session (18 Court Sess. Cas. 4th Series (Rettie) 90) that the case was governed by *Bryce* v. *Graham* in this House (2 & 3 Wil. & Shaw, 481 and 323 respectively); and that the Court of Session was fully warranted, by its practice extending over a very long period, to act in its discretion as it had done. A. B. *v.* C. D. - - - **616**

SCOTCH LAW—*continued.*

5. —— *Parent and Child—Reparation—Title to sue for Death of Illegitimate Child—Employers' Liability Act* (43 & 44 *Vict. c.* 42).] The parent of an illegitimate child has, by the law of Scotland, no right of action against a person whose negligence has caused its death.—*Samson* v. *Davie* (14 Court Sess. Cas. 4th Series (Rettie) 113) dissented from. CLARKE *v.* CARFIN COAL COMPANY - - - - - - 412

6. —— *Way—Servitude, right of Way for purposes of Sport—Constitution of Right.*] In order to found a prescriptive right of way according to Scotch law, the acts of possession relied on must be of such a character, or done in such circumstances as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted and the nature of the right.—A mountain path through a projecting tongue of an adjoining property formed a convenient short cut from one part of an estate to another. The evidence in support of a right of way over this path for the benefit of the estate shewed a use of the path from 1841 to 1887 by the proprietors of the estate—the appellants' predecessors—as a means of going from one part of the estate to the other when deer stalking in autumn, or for driving back stray sheep; but it was used by them for no other purpose. This use of the path was on only two occasions, in 1857 and 1882, challenged by the proprietor of the adjoining property. In 1888, he brought an action for interdict against the future use of the path by the appellants. The appellants limited their claim to a right of way for purposes connected with sport:—*Held*, that the appellants had failed to prove such an open and unequivocal assertion of the right of way as the law required. M'INROY *v.* THE DUKE OF ATHOLE - - 629

SECURITY FOR COSTS—Appeal to Privy Council - - - - 628

See PRACTICE—PRIVY COUNCIL.

SETTLEMENT—*Limitation in favour of Volunteers—Subsequent Conveyance by Settlor.*] A limitation in a marriage settlement in favour of the settlor's illegitimate child and his issue, not being within the marriage consideration, may be defeated by a subsequent conveyance by the settlor to a purchaser for value; unless such result would involve the defeat of other limitations within the marriage consideration. Special agreement between the parties thereto in favour of the limitation, acceptance by one of the parties of different interests in the settled property from those which the law would have given, omission to provide therein for all or some of the issue of the marriage, are insufficient to support such limitation against a purchaser for value.—*Mackie* v. *Herbertson* (9 App. Cas. 303) approved.—*Clarke* v. *Wright* (6 H. & N. 849) dissented from.—*Newstead* v. *Searles* (1 Atk. 264), and *Clayton* v. *Lord Wilton* (6 M. & S. 67) explained. DE MESTRE *v.* WEST - - - - - - 264

SHIP—*Charterparty—Payment of Hire to cease until Ship in an efficient state to resume Service—Payment during discharge of Cargo—Costs.*] By charterparty between the appellants and the respondents, it was agreed that the respondents should hire the appellants' steamship for the purpose of a voyage or voyages within certain limits at "8*s.* per gross registered ton per calendar month"—hire to continue until her re-delivery to the appellants (unless lost) at a safe port in the United Kingdom or on the Continent, &c. By the charterparty it was stipulated that the appellants should provide and pay for the provisions and wages of the captain and crew, and maintain the ship in a thoroughly efficient state in hull and machinery for the service; and that "in the event of loss of time from deficiency of men, or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel was stopped for more than forty-eight consecutive hours, the payment of hire should cease until she should be again in an efficient state to resume her service." While the vessel was on a voyage to Harburg, under the charterparty, her high-pressure engine broke down, and it was found necessary to put back to the port of Las Palmas. As repairs could not be effected in that port, the appellants and respondents agreed that a tug should be employed to tow the ship to Harburg, and that the expense, £1100, should be treated as general average on cargo, ship, and freight. As their proportion of this expense the respondents eventually paid £867. The ship left Las Palmas on the 18th of October, 1887, towed by the tug, and assisted by her own low-pressure engine; and arrived at Harburg on the 31st of October. By the 10th of November the cargo intended for that port was discharged, the ship's steam winches being available. On the same day the repairs to the ship's navigating machinery were completed, and the voyage continued:—*Held*, affirming the decision of the Court of Session (16 Court Sess. Cas. 4th Series (Rettie) 599), (Lord Bramwell, dissenting), that the appellants had no claim for hire for the voyage from Las Palmas to Harburg, the ship not being independently efficient for that purpose.—But, *held*, varying the decision of the Court of Session (Lord Morris dissenting), that the appellants were entitled to payment of hire for the full time actually occupied in discharging the cargo at Harburg, the ship being in an efficient state for that particular employment. HOGARTH *v.* MILLER, BROTHER & CO. - - - - - 48

2. —— *Collision—Fog—Alteration of Helm.*] There is no hard and fast rule of practice in the Admiralty Court that where two steamships in a fog are approaching one another so as to involve risk of collision neither ship ought to alter her helm until the signals of the other give a clear indication of her direction; each case must depend on its own circumstances, and these may afford reasonable ground for believing what the direction must be.—The decision of the Court of Appeal (14 P. D. 172) affirmed. OWNERS OF STEAMSHIP "VINDOMORA," AND OWNERS OF FREIGHT, &C. *v.* LAMB AND OWNERS OF STEAMSHIP "HASWELL," AND OWNERS OF CARGO, &C. THE "VINDOMORA" - - - - 1

3. —— *Collision—Contributory Negligence—Practice—Issue as to Contributory Fault must be first raised in the Lower Court.*] Where in a case of collision no suggestion has been made in the pleadings and evidence by either party that in

SHIP—*continued.*

the event of their vessel being found to be in the wrong, there was contributory fault on the part of the other vessel:—*Held*, that the vessel shewn to have been at fault by reason of her failure to keep out of the way could not be allowed to raise the question for the first time in the final Court of Appeal whether the other vessel was not also in fault from failure to comply with art. 18 of the Regulations.—*The Tasmania* (15 App. Cas. 223) followed. OWNERS OF S.S. "PLEIADES" AND PAGE (MASTER) *v.* PAGE (MASTER) AND OWNERS OF S.S. "JANE" AND LESSER - - 259

4. —— *Collision—Sailing Regulations—Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17—*Presumption of Blame.*] By s. 17 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), in a case of collision a ship proved to have infringed any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873 is to be deemed to be in fault.—The doctrine laid down in *The Fanny M. Carvill* (2 Asp. Mar. L. C. (N.S.) 565; 13 App. Cas. 455, n.) approved by Lords Bramwell, Herschell, Macnaghten, and Hannen, viz.: —The true construction of this section is that the infringement must be one having some possible connection with the collision; or, in other words, the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision; and the burden of shewing this lies on the party guilty of the infringement; proof that the infringement did not in fact contribute to the collision being excluded.—The decision of the Court of Appeal (15 P. D. 86) affirmed, the votes for and against being equal. EASTERN STEAMSHIP COMPANY *v.* SMITH. THE "DUKE OF BUCCLEUCH" - - - - - 310

5. —— *Damage to Wharf—Wharfinger, Liability of—Obstruction in bed of River—Riparian Owner—Negligence.*] The decision of the Court of Appeal (14 P. D. 138) reversed, and the decision of Butt, J., restored, on the ground that as the facts really stood there was no evidence of any breach of duty on the part of the wharfingers, and that the injury to the ship was caused by the captain and pilot attempting to berth her alongside the wharf at a time of the tide when it was not safe for a vessel of her draught and trim. TREDEGAR IRON AND COAL COMPANY *v.* OWNERS OF STEAMSHIP "CALLIOPE." THE "CALLIOPE" [11

—— Damage in dock—Negligence of harbour-master - - - - 499
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9 Geo. 4, *c.* 61, s. 1 (*Licensing Act*) - 173
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3 & 4 Will. 4, c. 74 (*Fines and Recoveries*) 639
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5 & 6 Will. 4, c. 83 (*Patents*) - 293, 430
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2 & 3 Vict. c. 67 (*Patents*) - - 430
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5 & 6 Vict. c. 35, s. 61, Sched. A, No. VI. (*Income Tax*) - - - - 531
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10 & 11 Vict. c. 17, ss. 6, 22, 25, 27 (*Waterworks Clauses*) - - - 81
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15 & 16 Vict. c. 83, s. 25 (*Patents*) - 293
See PATENT. 1.

19 & 20 Vict. c. 79 (*Bankruptcy—Scotland*), ss. 102, 103, 132, 152, 155 - - 608
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20 & 21 Vict. c. 71 (*Lunatics—Scotland*) 616
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25 Vict. (*Crown Lands Alienation—New South Wales*) - - - - 284
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26 Vict. No. 20, ss. 1, 2 (*Descent of Land—New South Wales*) - - - 244
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29 Vict. No. 1, No. 301 (*Land Transfer—Victoria*) - - - - 248
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31 & 32 Vict. c. 100 (*Court of Session—Scotland*) - - - - 616
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35 & 36 Vict. c. 94, s. 42 (*Licensing Act*) 173
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36 & 37 Vict. c. 85, s. 17 (*Merchant Shipping*) 310
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37 & 38 Vict. c. 49, s. 26 (*Licensing Act*) 173
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37 & 38 Vict. c. 85, ss. 8, 9 (*Public Worship*) 660
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39 & 40 Vict. c. 59, s. 3 (*Judicature Act*) 210
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41 Vict. c. 575 (*Land Tax—Victoria*) - 446
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43 & 44 Vict. c. 42 (*Employers' Liability*) 325
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44 Vict. No. 3 (*New South Wales—Stamp duties*) - - - - 476
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45 Vict. No. 723 (*Chinese—Victoria*) - 272
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45 & 46 Vict. c. 61, s. 7, r. 3 (*Bills of Exchange*) 107
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46 Vict. No. 17, s. 54 (*New South Wales—Criminal Law*) - - - 455
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46 & 47 Vict. c. 52, s. 4, sub-s. 1 (*h*) (*Bankruptcy*) - - - - 316
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46 & 47 Vict. c. 57, s. 113 (*Patents*) - 293
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50 Vict. No. 10 (*New South Wales—Stamp Duties*) - - - - 476
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51 & 52 Vict. c. 43, s. 120 (*County Courts*) 325
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TRADE-MARK—*Injunction—Fraudulent use of Names—Imitation—Intention to deceive the Public—"Stone Ale."*] The perpetual injunction granted by the Court of Appeal (41 Ch. D. 35) affirmed. MONTGOMERY *v.* THOMPSON - - - 217

TRINIDAD, LAW OF—*Practice—Order* 28, *r.* 12—*Order* 36, *r.* 18—*Order* 57, *r.* 6—*Duties of the Court.*] Where a plaintiff's demurrer to a defendant's plea is overruled and the real merits of the suit have not been disposed of, the Court should, under Order 28, r. 12, make such order as will allow them to be properly tried in accordance with the Rules of Court relatiug thereto.—Under Order 36, r. 18, a defendant on the non-appearance of the plaintiff is entitled to judgment dismissing the action; but it is irregular in such a proceeding for the judge to take evidence and adjudicate thereon.—Order 57, rule 6, does not authorize the Court to abridge the time allowed for trial in such manner as to preclude a fair hearing. Where a demurrer has been overruled and liberty given to plead the case ought not to be set down for trial till the time allowed by the rules has elapsed or without proper notice. POLLARD *v.* HARRAGIN - - - - 450

TRUST—*Creditors' Deed, Construction of—Resulting Trusts.*] The partners in a business, by a deed reciting the inability of the firm to pay their creditors, assigned the business and property of the firm to trustees upon certain trusts for the benefit of the creditors of the firm. The deed contained no provision in the event of there being a surplus:—*Held*, reversing the decision of the Court of Appeal and restoring the decision of Kekewich, J. (45 Ch. D. 38) that upon the natural and true construction of the deed there was an absolute disposal of all the proceeds to be realized for the benefit of the creditors, and that no resulting trust for the benefit of the assignors could be implied. SMITH *v.* COOKE. STOREY *v.* COOKE - - - - 297

TRUSTEE IN BANKRUPTCY — Scotch law — Appointment of new trustee - 608
See SCOTCH LAW. 2.

UTILITY—Patent—Prolongation - - 432
See PATENT. 3.

VICTORIA, LAW OF—*Aliens—Chinese Act*, 1881, *s.* 3—*Collector of Customs.*] By sect. 3 of the Victorian Chinese Act, 1881, a Chinese immigrant has no legal right to land in the colony until a sum of £10 has been paid for him.—Where the master of a vessel had committed an offence under the Act by bringing a greater number of Chinese immigrants into a port of the colony than the Act allows:—*Held*, that the collector of customs was under no legal obligation to accept payment tendered by the master on behalf of any such immigrants, nor when tendered either by or for any individual immigrant:—*Held*, further, that apart from the Act, an alien has not a legal right enforceable by action to enter British territory. MUSGROVE *v.* CHUN TEEONG TOY - 272

VICTORIA, LAW OF—*continued.*

2. —— *Transfer of Land—Forged Transfer—Fictitious Transferee—Forged Mortgage—Effect of Registration.*] The Victorian "Transfer of Land Statute" protects those who derive a registered title bonâ fide and for value from a registered owner. Accordingly they need not investigate the title of such owner, for they are not affected by its infirmities. But they must ascertain at their own peril his existence and identity, the authority of any agent to act for him, and the validity of the deed under which they claim.—The name of a registered owner having been removed in favour of a fictitious and non-existing transferee as the result of a forged transfer, a mortgage purporting to have been executed by such transferee was subsequently put upon the register by bonâ fide mortgagees.—In a suit by the true owner against the registrar, the mortgagees, and the perpetrator of the fraud: *Held*, (*a*) that the plaintiff's name must be restored to the register. (*b*) That the mortgage was invalid, and did not in favour of the mortgagee constitute an incumbrance on the plaintiff's title; though under the Act it would have that effect in favour of a bonâ fide registered assignee thereof. GIBBS *v.* MESSER - - - 248

3. —— *Transfer of Land — Land Tax Act*, 1877, *s.* 4, *sub-s.* 3—*Bonâ fide transfer for valuable Consideration.*] *Held*, that under the Land Tax Act, 1877, s. 4, sub-s. 3, according to its true construction, in order to exempt the owner of land from the payment of tax, the land must have passed from him, and the consideration passed from the transferee without any secret understanding or trust. HARDING *v.* COMMISSIONERS OF LAND TAX - - - 446

WATERWORKS COMPANY — *Reservoir—Mines—Compensation for Minerals not Workable—Prospective Injury to Mine—Apprehended Injury—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 22, 25, 27.] A special Act incorporating the Waterworks Clauses Act 1847 empowered the making of a reservoir in lands containing coal mines. The waterworks undertakers having given the mine-owners notice to treat for part of the coal, the mine-owners claimed compensation (to be settled by arbitration) not only for the value of the land to be taken (as to which no question arose) but also for injurious affection and prospective damage. The arbitrator found that the workings of the mine-owners had not as yet approached the reservoir so as to cause any present risk to the mines from the existence of the reservoir: that if the mine-owners were free to work their mines without risk of interruption from the undertakers' works, they could and would have got the whole of certain seams of coal under the reservoir and within forty yards of the boundary, and that if the undertakers purchased and retained in situ the coal which they had given notice to take and no other coal, the mine-owners, by reason of the undertakers' works and of apprehension of injury therefrom to one seam, could not get more than 50 per cent. of the coal under the reservoir or within twenty yards of its boundary: that a prudent lessee working without right to compensation would be compelled by

WATERWORKS COMPANY—*continued.*
reason of such apprehension of injury to abstain from working more than 50 per cent. of the coal within the defined area; and that there was no reason to apprehend injury present or future from the undertakers' works to any part of the mines if 50 per cent. of the coal in the defined area were retained in situ:—*Held*, affirming the decision of the Court of Appeal (20 Q. B. D. 699), that the mine-owners were not entitled to claim or to recover compensation for the prospective prevention of the working of more than 50 per cent. of the coal within the defined area: inasmuch as though the word "lands" in sect. 6 of the Waterworks Clauses Act 1847 includes "mines," the mine-owners were not injuriously affected within the meaning of sect. 6; neither could they at present claim or recover under the mines clauses of that Act, sects. 18 to 27. HOLLIDAY *v.* MAYOR, &c., OF BOROUGH OF WAKEFIELD - - - 81

WAY—Scotch law—Purposes of sport - - 629
See SCOTCH LAW. 6.

WHARF—Damage to—Negligence—Liability of wharfinger - - - - 11
See SHIP. 5.

WILL—*Construction*—"*Relatives named*"—*Illegitimate Relatives.*] The decision of the Court of Appeal (44 Ch. D. 590), upon the construction of a will and codicils, affirmed. SEALE-HAYNE *v.* JODRELL - - - - - - 304

—— Informal—Will of Maori—Law of New Zealand - - - - 435
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